

## EDUCATION VOUCHERS AND TUITION TAX CREDITS: IN SEARCH OF VIABLE PUBLIC AID TO PRIVATE EDUCATION

Public elementary and secondary schools have become government monopolies for students from low-income families who have no economic alternatives to education. In no community do citizens and voters exercise any effective control over the choice of teachers, curricula, methods, or materials used in public schools.<sup>2</sup> State laws compel children to attend school<sup>3</sup> and require public schools to provide instruction to all who attend.

Although private education<sup>4</sup> represents an alternative, only those able to afford tuition payments can exercise this option. In this sense, the students from low-income families, remain captive clientele of the government monopoly.

The failure of public elementary and secondary schools to accomplish their egalitarian purpose presents difficult questions. How can the quality and efficiency of public education be improved? If competition from the private sector would stimulate greater efficiency and improve the quality of public schools, should not private education be an alternative available to all children, not just the well-to-do? If so, how can the poor pay for private education without unconstitutional state aid destroying the distinction between public and private school?

Two possible answers to these questions lie in the areas of vouchers and tuition tax credits. These education reform proposals seek to eliminate the public school monopoly. Both proposals begin with the proposition that low and middle income families should enjoy the same choices in educating their children as higher income families enjoy. In addition, both proposals attempt to correct the apparent injustice experienced by parents who pay property tax to support the public school

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1. The scope of this note is limited to elementary and secondary education, grades K through 12.
  2. Egerton & Holt, *Can We Save the Schools*, PROGRESSIVE, March, 1982, at 28.
  3. See, e.g., IND. CODE 20-8.1-3-1 to 20-8.1-3-37. IND. CODE 20-8.1-3-17 states in part:  
*Compulsory Attendance:* Subject to the specific exceptions under this chapter, each child shall attend either a public school which the child is entitled to attend under IND. CODE 20-8.1-6.1 [20-8.1-6.1-1—20-8.1-6.1-11] or some other school which is taught in the English language and which is open to inspection by the state attendance officer, local attendance officers, and school officials. A child is bound by the requirements of this chapter from the earlier of the date on which he officially enrolls in a school or he reaches the age of seven [7], until the date on which he reaches the age of sixteen [16]. . . .
  4. For the purposes of this note, the term private education is defined to mean all non-publicly tax supported schools including parochial schools which are defined as private schools maintained by religious bodies.

system and who then pay tuition fees to keep their children enrolled in a private school.

According to the education voucher system state public authorities would issue a voucher for each school age child. The family would then enroll their child in any approved private, public or parochial school in the competitive market. In exchange for enrollment, parents submit a voucher which the school redeems with public authorities for cash.<sup>5</sup> In economic terms the "voucher plan" represents a "demand side" pressure, seeking to affect the supply and quality of education.<sup>6</sup> According to voucher theorists, the school market would spur educational innovation so that innumerable combinations of schools could offer differing educational curricula.<sup>7</sup>

With tuition tax credits, parents who send their children to a private elementary or secondary school would qualify for a credit on the I.R.S. 1040 form.<sup>8</sup> Determining the credit would involve a series of calculations and some proof of attendance at an eligible educational institution.<sup>9</sup> The primary purpose of the tuition tax proposal is to enhance the equality of educational opportunity for all Americans at the schools of their choice.<sup>10</sup>

To understand education vouchers and tuition tax credits, one must understand their background, the various types of proposals, the claims of proponents and fears of opponents, and the constitutional issues involved. This note will first analyze the regulated education voucher proposed by Christopher Jencks. Second, this note will analyze the tuition tax credit bill sponsored by Sen. Robert Packwood (R-Or.) and Sen. Daniel Patrick Moynihan (D-N.Y.), and the bill sponsored by the Reagan Administration. Third, this note will examine the constitutional issues posed by education vouchers and tuition tax credits in light of *Committee for Public Education v. Nyquist*<sup>11</sup> and *Sloan v. Lemon*.<sup>12</sup>

Finally this note will examine the idea of neutrality in promoting religious liberty. This note will include an analysis of two controversial

5. Jencks, *Giving Parents Money to Pay for Schooling: Education Vouchers*, THE NEW REPUBLIC, July 4, 1970, at 19.

6. *No Magic in Vouchers*, NATION, June 29, 1970, at 773.

7. Berube, *The Trouble With Vouchers*, COMMONWEAL, Jan. 29, 1971, at 414.

8. A tax credit, unlike a tax deduction which reduces the income to be used in the computation of taxes, reduces the tax due. Moynihan, *Government and the Ruin of Private Education*, HARPER'S, Apr. 1978, at 31.

9. *Should Tax Credits For Tuition Payments To Colleges and Nonpublic Schools Be Enacted? Pro and Con*, 58 CONG. DIG. 18, January 1979, at 19 [hereinafter cited as CONG. DIG. - *Tax Credits*] (From a statement presented before the Committee on Ways and Means of the U.S. House of Representatives on Feb. 21, 1978, during hearings on the subject of tax treatment of tuition expenses by Sen. Robert Packwood, R-Or.).

10. *Id.* at 16 (From a statement by Sen. William V. Roth, Jr., R-Del.). There are many different specific proposals for tuition tax credits. This is partly due to the fact that credits can be targeted to any income level.

11. 413 U.S. 756 (1973).

12. 413 U.S. 825, *reh'g den.*, 414 U.S. 881 (1973).

cases: *Mueller v. Allen*,<sup>13</sup> the Minnesota tuition tax credit case before the Supreme Court during its 1982-83 Term; and *Rhode Island Fed. of Teachers, AFL-CIO v. Norberg*,<sup>14</sup> which held unconstitutional a statute virtually identical to the one upheld in *Mueller*. The purpose of this note, therefore, is not to argue the merits of private or public education, but to explain the dynamics of two education reform proposals.

### EDUCATION VOUCHERS

Education vouchers date back to the time of Thomas Paine<sup>15</sup> and Adam Smith.<sup>16</sup> Since that era, the G.I. Bill has provided a type of voucher which permits veterans to select their higher education from the college and university market place.<sup>17</sup> Recent interest in the idea of education vouchers, however, has its roots in the 1950s and 1960s.<sup>18</sup> During this period, Milton Friedman promoted the idea of education vouchers and several southern legislatures applied the idea by giving parents money to send their children to segregated "white academies."<sup>19</sup>

In 1970 the Center for the Study of Public Policy in Cambridge, Massachusetts, under the direction of Christopher Jencks, designed a "regulated voucher plan" that sought to avoid many of the objections against earlier voucher schemes.<sup>20</sup> This regulated voucher plan became known as the "Jencks plan."<sup>21</sup> The Office of Economic Opportunity (OEO) sought to implement this plan as a five-year pilot project in a city with a sufficient cross section of public and private schools and

13. 676 F.2d 1195 (8th Cir.), cert. granted, 51 U.S.L.W. 3220 (1982) (No. 82-195).

14. 630 F.2d 855 (1st Cir. 1980).

15. For a thorough discussion of Thomas Paine's voucher idea, see West, *Thomas Paine's Voucher Scheme for Public Education*, 33 S. ECON. J. 378 (1967). Briefly, Paine proposed that state governments pay poor families a small amount to provide for the education of each child under 14.

16. In 1776, Adam Smith suggested that the master of a public school should receive only part of his salary from the government. "If he was wholly or even principally paid by it," Smith said, "he would soon learn to neglect his business." See Janssen, *Education Vouchers*, AM. EDUC., Dec. 1970, at 9.

17. *Id.*

18. See generally Taylor, *Education Vouchers: Addressing the Establishment Clause Issue*, 11 PACIFIC L.J. 1063 (1980).

19. In 1955, Milton Friedman proposed that the state give money to parents to be used in securing education for their children in whatever schools the parents might choose. See Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST (1955); Friedman, *The Role of Government in Education*, in CAPITALISM AND FREEDOM (1962); LA NOVE, EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES, 8-18 (1972); Ovalan, *Do Vouchers Deserve at Least a Sporting Chance?* EDUC. DIG., Mar. 1973, at 20.

20. See generally CENTER FOR THE STUDY OF PUBLIC POLICY, HARVARD UNIVERSITY, EDUCATION VOUCHERS: A REPORT ON FINANCING ELEMENTARY EDUCATION BY GRANTS TO PARENTS. (1970) [hereinafter cited as the JENCKS REPORT], which thoroughly discusses education vouchers.

21. Taylor, *supra* note 18, at 1063. The Jencks Plan, which was implemented at Alum Rock, was conceived in something of a political vacuum. Financed by the Johnson Administration and published under the Nixon Administration, visions of a grandiose voucher test were frustrated by the Nixon Administration's emphasis on a modest voucher experiment. Yet, the Nixon Administration's long campaign to "sell" this modest voucher plan experiment to any school district that would accept funds for a trial was fruitless and did not work.

disadvantaged and middle class students to create a valid experiment.<sup>22</sup> The OEO originally planned to select four cities for institution of the pilot project.<sup>23</sup> Due to national opposition to the voucher idea,<sup>24</sup> however, only the Alum Rock School District in San Jose, California agreed to implement the project from 1972 to 1977.<sup>25</sup>

In reality, the Alum Rock School District became involved with the OEO plan primarily because it was a low income school district which needed the funds that the voucher experiment would generate.<sup>26</sup> No private schools participated in the project,<sup>27</sup> thus the major purpose behind the voucher idea, to provide parents with educational alternatives was not achieved.<sup>28</sup> The experiment at Alum Rock created somewhat of an open admissions system, whereby parents could choose from among school programs, but not from competing schools. As a result the OEO was unable to evaluate the effectiveness of a true education voucher system.<sup>29</sup>

If choice and diversity are desirable, then schools in Alum Rock were better places.<sup>30</sup> Evaluators of the Alum Rock experiment concluded that parental choice in educational alternatives could be increased without a flurry of vouchers.<sup>31</sup> Such a conclusion prompted public elementary and secondary schools to develop educational alternatives.<sup>32</sup> When viewed as an exploration of educational alternatives, the Alum Rock experiment proves a source of suggestive ideas and les-

22. Janssen, *Education Vouchers*, EDUC. DIG., Mar. 1971, at 7-8 [hereinafter cited as Janssen, EDUC. DIG.]. Of the 30 cities considered for an experiment, none lived up to expectation. Those cities which had received endorsements from their local school boards (Seattle, San Diego, Alum Rock, San Jose) were not the stuff of a national program that seeks to "improve the education of children, particularly disadvantaged children," and also seeks "to give parents, and particularly disadvantaged parents, more control over the kind of education their children get." See Berube, *supra* note 7, at 416.

23. Solet, *Education Vouchers: An Inquiry and Analysis*, 2 J.L. & EDUC. 105 (1972).

24. Taylor, *supra* note 18, at 1063.

25. The American Federation of Teachers branded the voucher plan as "hucksterism" that "could turn into a very costly and tragic mistake with far-reaching social implications." The American Jewish Congress followed suit by terming the plan a "disaster for our country" fearing a breakdown of church-state separation. The NAACP cautioned against vouchers as promoting racial separation. See Berube, *supra* note 7, at 415.

26. OEO funds, \$6 to \$8 million per year, were to be used only for administration and transportation costs. See *The Voucher Plan: NEA Position*, TODAY'S EDUC., Nov. 1970, at 80. Taylor, *supra* note 18, at 1063. According to Cohen & Farrar, *Power to the Parents? - The Story of Education* at 81, Alum Rock Superintendent William Jefferds quickly learned that OEO and the Center for the Study of Public Policy needed him more than he needed them. While Jefferds wanted a voucher test because he needed the money, the OEO, fresh from several stunning defeats in other cities, needed a working demonstration to keep the whole voucher project afloat.

27. While a prospective school, called "Gro-Kids," got a small planning grant in the spring of 1973, and operated an after school program the following fall, in the winter of 1974 no parent selected Gro-Kids and it promptly vanished. See generally Cohen and Farrar, *supra* note 26, at 85. Moreover, private and parochial schools were not included in the experiment because the California legislature was reluctant to pass the necessary legislation that would be needed to permit public funds to flow to such schools. See Taylor, *supra* note 18, at 1063.

28. *Id.*

29. *Id.*

30. Cohen & Farrar, *supra* note 26, at 96-97.

31. *High-Price Supermarket*, ECONOMIST, June 1978, at 22.

32. Fantini, *External and Internal Education Vouchers*, CUR. HIST., Aug. 1972, at 61.

sons.<sup>33</sup> When narrowly assessed, however, the Alum Rock experiment, in terms of its assumptions about political participation and school, fell short of its stated objectives.

Lack of a single economic model which receives wide acceptance complicates the debate for and against education vouchers.<sup>34</sup> Education voucher proposals range from the free market version supported by Milton Friedman to the highly regulated "Jencks plan."<sup>35</sup> Aside from the degree of regulation in the various voucher plans, all plans promote increased consumer interests in alternative forms of education and acknowledge the intrinsic value of individual choice.<sup>36</sup> All voucher plans begin with the assumption that the importance of education justifies public financial support for elementary and secondary schools.

All voucher plans further assume that no "best" school exists for all students. Rather, voucher plans seek to encourage a range of school types that will most effectively serve the diverse needs of a student body. Finally, all voucher plans assume that parents should have the power to choose which of the different "state-approved" schools would best serve their child's needs. Beyond these points, voucher plans differ with regard to the precautions needed. A voucher plan must ensure that all parents, rather than just the affluent, make choices. A voucher plan must ensure that qualifying elementary and secondary schools maintain state-required standards.<sup>37</sup>

Despite the several ways of operating a voucher scheme,<sup>38</sup> voucher advocates acknowledge that voucher systems must contain many built-in safeguards.<sup>39</sup> Legal constraints, particularly with regard to racial segregation, place limits on the type of voucher plans available to state school systems.<sup>40</sup> Consequently, only a regulated voucher plan which,

33. Cohen & Farrar, *supra* note 26, at 97, summed up the Alum Rock voucher experience by stating:

Cooking up the voucher test thus began with one small and dusty California school district, poor and discontented. To this were added two rather different recipes for political reform, a dollop of federal dollars, and intermittent doses of outside advice. With such ingredients and so many contending cooks, it is no surprise that the result was eventually something of a stew. But if Alum Rock did not test a single clear plan, its experience does throw some light on how vouchers worked in practice - if not how they might have worked in principle.

*Id.* at 82.

34. Areen, *Educational Vouchers*, 6 HARV. C.R.-C.L. L. REV. 470 (1973).

35. Seven alternative plans are discussed at length in the JENCKS REPORT, *supra* note 20. They include: Unregulated or Free Market Model; Unregulated Compensatory or Graduated Model; Compulsory Private Scholarship Model; Effort Voucher Model; Egalitarian Model; Achievement Model; and, the Regulated Compensatory Model. These seven economic models do not exhaust the range of possible voucher arrangements. For example, vouchers might be confined to public schools (internal vouchers) or limited to private schools (external vouchers).

36. Fantini, *supra* note 32, at 61.

37. Areen, *supra* note 34, at 470.

38. *See supra* note 35.

39. Janssen, *supra* note 16, at 11.

40. Areen, *supra* note 34, at 503.

ensures integration and avoids church-state problems,<sup>41</sup> would have the slightest hope of withstanding constitutional scrutiny.<sup>42</sup>

The Jencks regulated voucher plan<sup>43</sup> creates a locally-controlled Education Voucher Agency (EVA) as a first step. This agency would collect local and state education funds, plus an increment from the federal government to support "compensatory" vouchers for poor children,<sup>44</sup> and, in return, distribute vouchers to parents of school age children. In the spring, each participating public and private school would inform the EVA as to its projected capacity for the following year. The participating school would then be required to accept any student who applies. If too many students apply, the Jencks plan requires the school to fill half its enrollment by lottery. The EVA would publicize information about every school before giving each parent a voucher, equivalent to the average per pupil expenditure in the public schools.<sup>45</sup> Parents would give their voucher to the qualifying school, which would, in turn, exchange the voucher for cash from the EVA. Under this plan, any exclusion from a particular school would be by lottery rather than racial or economic considerations.<sup>46</sup>

Proponents of education vouchers argue that a regulated voucher system, similar to the Jencks plan, avoids establishment clause conflicts and insures racial and economic integration.<sup>47</sup> Moreover, they contend that education vouchers will spark the stagnant public school monopoly by injecting competition into the education arena.<sup>48</sup> The claim that vouchers would "destroy the public schools" remains far fetched. A look at the educational choices made by those who can already afford whatever schooling they want for their children reveals that many still prefer public elementary and secondary schools.<sup>49</sup> Consequently, education vouchers would offer, to low income families, presently unavailable educational options<sup>50</sup> and offer to higher income families a wider

41. The constitutionality of education vouchers and tuition tax credits is discussed, *infra* notes 121 to 164 and accompanying text.

42. Janssen, *supra* note 16, at 11.

43. See JENCKS REPORT, *supra* note 20.

44. Compensatory vouchers for poor children are necessary for a number of reasons. If the vouchers represent the property tax that is paid to support public schools, a poor person would receive no voucher since he would own no taxable real property. Further, the cost of private schools may exceed the value of a voucher (i.e. the average per year cost of educating a child in the public schools). Last, compensatory vouchers are necessary to enable poor families to have a realistic choice other than warehousing their poor children in public schools. See *Everson v. Board of Education*, 330 U.S. 1 (1947), which upheld the constitutionality of a public program which, in effect, paid the transportation costs of parochial school students. Federal funds would also be available to provide additional transportation required.

45. See JENCKS REPORT, *supra* note 20. Under the Jencks plan, the EVA would determine vouchers based upon a sliding scale. In effect, the voucher for the poorest child may be twice as much as the basic voucher.

46. Janssen, EDUC. DIG., *supra* note 22, at 7-8.

47. Janssen, *supra* note 16, at 10.

48. See *The Jencks Tuition Voucher Plan*, AMERICA, June 20, 1970, at 645.

49. Jencks, *supra* note 5, at 21.

50. *Controversy Over Federal Experimentation With Education Vouchers: Pro and Con*, CONG. DIG., Aug. 1972, at 218 [hereinafter cited as *Vouchers*, CONG. DIG.].

range of educational alternatives.

Proponents claim that education vouchers would enable a school to concentrate its efforts. It would appeal to parents who want their children to concentrate upon a specific discipline, such as science, music or art. Those familiar with the interest-centered high schools in New York and other large cities admit that desegregation does not present a problem in these schools.<sup>51</sup> Moreover, vouchers are directed to the problem of overcrowded public education within urban centers.<sup>52</sup> Opponents argue that education public vouchers violate the establishment clause and are, therefore, unconstitutional.<sup>53</sup> Under the voucher system a share of public tax money raised for educational purposes represents direct aid to private schools, the vast majority of which are religious institutions.<sup>54</sup>

Opponents further contend that, education voucher plans would lead to "hucksterism" where private school administrators misrepresent the capabilities of their school in order to recruit students and accumulate funds.<sup>55</sup> Opponents also argue that education vouchers would divide and weaken our nation. To make private schools financially advantageous invites the creation of divisive school experiences for children. Theoretically, a group of interested parents could form "Hard hat," White Citizens Council, Black Panther, John Birch, or Socialist Workers schools.<sup>56</sup> A division of limited financial personnel and capital resources between two competing systems of education—one which is responsible and accountable to the public and the other with overwhelming responsibility and accountability only to private interests constitutes unsound public policy. A requirement that each qualifying school accept all who apply becomes meaningless when the school's curriculum is so skewed toward a particular point of view that those who disagree with the orientation will either not apply or will leave once admitted.<sup>57</sup> Opponents argue that policing of voucher schools would require a bureaucracy even larger than presently exists in the public school system. Opponents also contend that education vouchers will promote economic and racial segregation<sup>58</sup> thus resulting in further "white-flight" from the public schools.

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51. *Id.* at 220.

52. Elford, *The Voucher Plan Debate*, AMERICA, Jan. 29, 1972, at 90. La Nove, *supra* note 19, at vii. Last, those who see education vouchers as a clandestine device to get money into the Catholic Church are incorrect. With public money goes public regulation. While most pastors and principals expect some public regulation (such as fire inspections, minimum curriculum requirements), many regard the idea of public regulation and inspection of their educational system as anathemas.

53. The constitutionality of education vouchers and tuition tax credits is discussed *infra* notes 119-64, and accompanying text.

54. Over 90% of the enrollment in non-public schools in our country is in denominational or parochial schools. See *Vouchers*, CONG. DIG., *supra* note 50, at 221.

55. Hucksterism, in this context, refers to the promotion of education through showmanship.

56. *Vouchers*, CONG. DIG., *supra* note 50, at 219.

57. *Id.*

58. See Janssen, *supra* note 16, at 10.

Finally opponents contend that many parents are not capable of making informed choices about education.<sup>59</sup> Under the voucher system, public schools would become the "dumping ground" for disadvantaged students whose parents lack the sophistication or knowledge to use the system.<sup>60</sup> Opponents claim that public education, for all its flaws and shortcomings, is the nearest thing we have to a publicly owned and operated institution devoted to the general welfare.<sup>61</sup>

The prospects of free enterprise being introduced into education via the regulated voucher plan appear slight.<sup>62</sup> Despite their economic appeal, regulated vouchers have not worked in practice.<sup>63</sup> In addition, regulations requiring payment of vouchers directly to the school and attendance requirements necessary to promote integration, involve constitutional issues.<sup>64</sup> Given the statutory and constitutional barriers to the implementation of a regulated voucher plan, a more viable means to provide public funds for private education must be explored through the tuition tax credit plan.

### TUITION TAX CREDITS

In the 1950's, Congress realized the need to assist those families who wanted to enroll their children in private schools. Legislative proposals allowed families a tax deduction from adjusted gross income for some portion of college expenses and an additional personal exemption for each student.<sup>65</sup> Between 1967 and 1977, six education tax proposals passed the Senate,<sup>66</sup> but failed to gain support in the House of Representatives.<sup>67</sup> Presently, the Moynihan-Packwood Bill<sup>68</sup> and the Reagan

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59. See Wilby, *The Vagaries of Vouchers*, NEW STATESMAN, Nov. 7, 1975 at 566.

60. Jencks, *supra* note 5, at 10.

61. Egerton, *supra* note 2, at 27.

62. La Nove, *supra* note 19, at vii.

63. Elford, *supra* note 52, at 91.

64. See discussion, *supra* notes 26 to 33 and accompanying text, on the Alum Rock voucher experience.

Unregulated vouchers, by definition, would allow students to attend any schools without regard to state attendance requirements, federal desegregation plans, state teacher requirements, curriculum requirements, etc. Under such a scheme, one can easily imagine the resurrection of white segregated academies. The entanglement issue between state and church schools is magnified with an unregulated voucher scheme which would place no controls over how a particular church school would spend its voucher money. Church schools under an unregulated voucher plan could conceivably spend their education voucher dollars for purely religious purposes.

65. See generally JOINT COMMITTEE ON TAXATION, DESCRIPTION OF S.550 TUITION TAX RELIEF ACT OF 1981, 97th Cong., 1st Sess. June 3 and 4, 1981, [hereinafter cited as JOINT COMM. REP.] which concisely describes the present law relating to tax and non-tax benefits for education.

66. For a catalogue of the various proposals, see PASTORIUS, TAX RELIEF TO STUDENTS AND PARENTS FOR HIGHER EDUCATION EXPENSES, CONG. RESEARCH SERVICE NO. 76-221 CR, at 21, n. 1 (1976); see also Hunter, *The Continuing Debate Over Tuition Tax Credits*, 7 HASTINGS CONST. LAW Q. 526 (1980).

67. JOINT COMM. REP., *supra*, note 65, at 8. Since 1964 every Congress has considered some form of tuition tax credit legislation.

68. S.550, 97th Cong. 1st Sess. (1981).



Administration's tuition tax credit proposal<sup>69</sup> are attracting the attention of public funding proponents.

Before examining these two proposals, however, one must understand the present law relating to tax benefits for educational expenses.<sup>70</sup> Present law provides no tax credit or deduction for personal educational expenses.<sup>71</sup> In certain cases, taxpayers may claim a personal exemption for a dependent, which they could not claim otherwise, because the dependent is a student.<sup>72</sup> Individuals may exclude from gross income amounts received as scholarships and fellowships,<sup>73</sup> or amounts received under qualified educational assistance programs.<sup>74</sup> Additionally, certain types of "job-related" education expenses may be deducted.<sup>75</sup>

Private elementary and secondary education obtains financing primarily through private funds.<sup>76</sup> Many private schools and their students, however, receive some sort of public financial assistance.<sup>77</sup> In this area existing tax laws appear inconsistent. For example a taxpayer may take a deduction for any contribution to an education institution but may not presently deduct the amount contributed towards tuition payments.<sup>78</sup> A taxpayer may deduct a business expense aimed at enhancing the economic status of his business<sup>79</sup> but may not deduct the expense needed to increase the economic usefulness of his children in years to come.<sup>80</sup> Inconsistencies, such as these, make tax credits a potentially viable means to provide aid to education with the least amount of federal control possible.

69. S.2673, 97th Cong. 2d Sess. (1982).

70. See generally JOINT COMM. REP., *supra* note 65, at 4-8.

71. As a general rule, education costs which either qualify the taxpayer for a new trade or business, or which constitute the minimum educational requirement for qualification in his job, are never deductible. [Treas. Regs. §§ 1.162-5(b)(2), (3)].

72. I.R.C. § 151 (1976): Generally, a taxpayer may claim a \$1,000 personal exemption deduction for each dependent who has less than \$1,000 gross income for a taxable year. The gross income limitation, however, does not apply if the dependent is the taxpayer's child and is under the age of nineteen or is a student.

73. I.R.C. § 117 (1976).

74. I.R.C. § 127 (1976).

75. Under I.R.C. § 162 (1976), education expenses which qualify as trade or business expenses may be deducted.

76. I.R.C. § 103(a)(2) and (e)(1976).

77. Some provisions that benefit education, in general, and sometimes students, in particular, include the exclusion from income of gifts, I.R.C. § 102, which may comprise a large portion of a student's support, and the charitable contribution deduction, I.R.C. § 170, which allows a deduction for contributions to educational institutions. Other provisions, such as the exclusion of interest on State and municipal bonds, I.R.C. § 103, and the deduction for State and local taxes, I.R.C. § 164, indirectly assist publicly-supported educational institutions by easing the financial burden on State and local governments.

78. I.R.C. § 170 (1976) Individual taxpayers are entitled to deduct up to 50% of their adjusted gross income for contributions to recognized charities. I.R.C. § 170(c).

79. I.R.C. §§ 162, 212 (1976).

80. Lechtreck, *Tax Relief and Aid to Nonpublic Education*, AMERICA, Oct. 14, 1972, at 285. See also *Winters v. Comm'r*, 468 F.2d 778 (2d Cir. 1972), where parents of students attending a "tuition free" church school were encouraged to contribute to the school in order to keep the school operating. Under these circumstances, no deduction was available; payments were treated as costs of education from which an economic benefit was anticipated.

At least twenty tuition tax credit bills were introduced during the first month of the Ninety-Seventh Congress.<sup>81</sup> The Reagan Administration and congressional proponents of tuition tax legislation consider S. 550, introduced by Senators Packwood (R-Or.), Moynihan (D-N.Y.), and others, to be the most effective bill.<sup>82</sup> This bill provides for a tax credit for fifty percent of tuition payments for students in elementary, secondary, private and public colleges, and vocational schools. For the first year, the maximum tuition credit refundable or applied to one's tax bill would be \$250 by August 1982. This credit or refund would rise to \$500 by August 1983 and, by August 1984, full credit will be extended to graduate students and half-time students at colleges and vocational schools.<sup>83</sup>

According to the Packwood-Moynihan proposal, if the taxpayer has a tax liability less than the tax credit due, then the federal government would refund the difference.<sup>84</sup> Without this supplemental income allowance for nonpublic school tuition to welfare recipients and the working poor,<sup>85</sup> tuition tax-credits would discriminate against lower-income families.<sup>86</sup>

In April 1982, President Reagan<sup>87</sup> proposed tuition tax credit legislation (S. 2673)<sup>88</sup> that would allow a family to take an income tax credit for up to fifty percent of tuition expenses for each student in a private elementary or secondary school.<sup>89</sup> The maximum amount of credit would be \$100 beginning in 1983, \$300 beginning in 1984, and \$500 after 1985.<sup>90</sup> Maximum allowable credit would be reduced as a taxpayer's adjusted gross income increases over \$50,000 per year and would be phased out entirely for taxpayers with incomes of \$75,000 or

81. Wood, *Tuition Tax Credits for Non-public Schools?* 23 J. CHURCH & ST. 5 (1981).

82. JOINT COMM. REP., *supra* note 65, at 1. See generally *id.* at 8-17, for a thorough discussion of prior and current Packwood-Moynihan tuition tax credit proposals. This is essentially the same legislation introduced by Senators Packwood & Moynihan three years ago in the Ninety-fifth Congress and again in the Ninety-Sixth Congress.

83. S.550, 97th Cong. 1st Sess. (1981).

84. Wood, *supra* note 81, at 5.

85. Spiers, *Tax Credits for Nonpublic School Parents*, AMERICA, May 20, 1972, at 537.

86. Doerr, *Federal Parochial Aid Again*, HUMANIST, July/Aug. 1979, at 61. A tuition grant for poor students attending private and parochial elementary and secondary schools, such as a "Baby" BEOG appears to be necessary. For a further explanation of "Baby" BEOGs, see Note, *Public Funding of Private Education: A Public Policy Analysis*, 10 J. LEGIS. 146, 164-67 (1983).

87. In his 1980 campaign, Mr. Reagan endorsed tuition tax credits in an appeal to fundamentalist Protestants and conservative Catholics who heavily patronize parochial schools. His renewed interest in the proposal comes at a time when White House polls are showing an erosion of support for Mr. Reagan among key groups, including ethnic Catholics, who made up his 1980 electoral coalition. This is especially true with the recent success of liberal Senate filibusters killing bills that would have allowed prayer in public schools and prohibited most abortions. See N.Y. Times, Apr. 16, 1982, at 1 and 9, cols. 3-4.

88. The actual bill was introduced by Senate Finance Committee Chairman Robert Dole (R-Kan.) in June. As of the date of this writing, S.2673 is still pending in the Senate Finance Committee and it is very unlikely it will get through Congress during the present session.

89. *Tuition Credits: Reagan Offers Strong Backing of Administration Bill*, DAILY EXEC. REP. (BNA) No. 137, at G-1 (July 16, 1982). [hereinafter *Tuition Credits*, DER-BNA].

90. *Id.*

more.<sup>91</sup> The Reagan proposal (S. 2673) discourages parents from sending their children to racially discriminatory schools by requiring that the tax credit be granted only to students attending tax-exempt schools which comply with the Internal Revenue Service's non-discriminatory regulations.<sup>92</sup>

In September 1982, the Senate Finance Committee approved a version of the Reagan Administration's tuition tax credit proposal.<sup>93</sup> The committee bill, however, reduced the overall loss of federal funds down to \$2.1 billion in fiscal 1984-87.<sup>94</sup> This new version would provide a tax credit equal to half of private elementary or secondary school tuition, up to a maximum of \$100 per child in 1983, \$200 in 1984, and \$300 in succeeding years.<sup>95</sup> Under Reagan's original proposal, the credit would have reached \$500 a year per child. The bill would take effect July 31, 1983. Only parents with incomes of up to \$50,000, rather than the Administration's \$75,000, would qualify for credit under the committee bill.<sup>96</sup>

While the Reagan bill and the Packwood-Moynihan bill are estimated to cost the government about the same in terms of reduced budget receipts,<sup>97</sup> the Reagan bill does not incorporate any refund mechanism for those low-income families who pay little or no taxes.<sup>98</sup> Consequently, the administration's bill could be viewed as discriminatory against these lower-income families.<sup>99</sup> Moreover, even though both bills will cost about the same, the Reagan proposal is considerably smaller in scale because it includes only private elementary and secondary schools.<sup>100</sup>

Proponents of tuition tax credits contend that such a program will reduce the impact of rising tuition costs at private schools and foster a

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91. *Id.*

92. *Id.* at G-2. However, two cases involving the question of whether schools with racially discriminatory policies may qualify for tax-exempt status are pending before the Supreme Court: *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D. N.C. 1977), *cert. granted*, 50 U.S.L.W. 3278 (1981) (No. 81-1) and *Bob Jones University v. United States* 639 F.2d 147 (4th Cir. 1981) *cert. granted*, 50 U.S.L.W. 3278 (1981), (No. 81-3).

93. See Donnelly, *Senate Committee Approves Tuition Tax Credit Proposal*, CONG. Q. WEEKLY REP., Sept. 18, 1982, at 2297. The Senate Finance Committee voted 11-7 in favor of the Reagan Administration's proposal.

94. *Id.*

95. *Id.*

96. *Id.* The committee tied the effective date of the bill to the resolution of the tax-exemption issue and accepted a series of White House-backed amendments strengthening protections against tax credits for parents of students in schools that discriminate on the basis of race.

97. *Id.* The Reagan proposal is estimated to cost the government \$100 million in FY1983. This compares to the Packwood-Moynihan bill which was estimated to cost \$99 million in FY 1982, had it been approved.

98. In Senate Finance Committee testimony in favor of S.2673, Treasury Secretary Donald Regan and Education Secretary Terrence Bell both rejected proposals to reduce the income ceiling for eligibility and to couple the credits with some kind of refund mechanism to low-income families, including those that pay little or no taxes. *Tuition Credits*, DER-BNA, *supra* note 89, at G-1.

99. See *supra* note 86.

100. This was mainly due to budgetary constraints. See N.Y. Times, *supra* note 87.

healthy kind of competition between private and public schools.<sup>101</sup> Unlike our present federal student aid programs, tax credits would not stimulate further expansion of the already massive and costly federal bureaucracy.<sup>102</sup> Although the Reagan proposal does not incorporate any refund mechanism, proponents of tax credits, in general, argue that when refunds are provided tuition tax credits do not discriminate against low-income families.<sup>103</sup> Current means-tested grant programs fail to aid the millions of families unable to afford tuition costs who are also ineligible for need-based government assistance programs.<sup>104</sup> The Bureau of the Census has compiled income distribution statistics showing that 64.2% of children attending private elementary and secondary schools come from families with incomes of less than \$20,000.<sup>105</sup>

Nothing exists either in the United States Constitution or in our history to indicate any condemnation of a neutral tuition tax credit plan which would promote secular and non-secular schools in the public and private sectors. Furthermore, proponents argue, elementary and secondary tuition tax credits do not constitute revolutionary policy. The Veterans Administration's veterans' educational benefits, which have had strong support down through the years, provide college benefits, to both public and private schools.<sup>106</sup>

According to proponents, excellence in education necessitates plurality and choice.<sup>107</sup> Congress must recognize the financial burden now borne by those who must pay tuition to obtain the education that best serves their needs and aspirations. Contrary to what critics believe, proponents maintain that schools will not increase their tuitions upon adoption of a tuition tax credit. In fact, competition for students will continue to restrain schools from increasing their tuitions.<sup>108</sup>

Opponents of tuition tax credits in general, and especially the Reagan proposal, argue that such a bill would promote racial and economic discrimination. Since the Reagan bill does not provide any refund mechanism to low-income families who pay little or no taxes, the bill does promote economic discrimination. In effect, the bill would offer a windfall to those families already able to provide their children with a private education.<sup>109</sup>

101. *Tuition Credits*, DER-BNA, *supra* note 89, at G-1. Tuition tax credits represent the most effective and least complicated way to provide students and parents with financial relief from the sky rocketing costs of education.

102. CONG. DIG.—*Tax Credits*, *supra* note 9, at 16. (From a statement presented by Sen. Robert Packwood before the Committee on Ways and Means of the U.S. House of Representatives on February 21, 1978, during hearings on the subject of tax treatment of tuition expenses).

103. *Id.* at 10.

104. *Id.* at 16 (statements by Rep. Bill Frenzel, IR-Minn.)

105. *Id.* at 12 (statements by Sen. Robert Packwood, R-Or.)

106. *Id.* at 14 (statements by Sen. William V. Roth, Jr., R-Del.)

107. *Id.*

108. *Id.* at 16. According to recent studies, college enrollment drops by one to three per cent for every \$100 increase in tuition. If a college does raise its tuition to capture the tuition tax credit, it will lose enrollment to colleges which do not increase tuition.

109. N.Y. Times, July 16, 1982, at 10, col. 3.

Opponents also claim that tuition tax credits would promote racial discrimination by fostering the establishment of substandard segregated academies. The Reagan Administration's announced position in *Goldsboro Christian Schools, Inc. v. United States*<sup>110</sup> and *Bob Jones University v. United States*<sup>111</sup> was that it would recognize tax exemptions for private schools irrespective of racially exclusive policies compounds this fear.<sup>112</sup> Opponents also dwell on the revenue losses that will result with a tuition tax credit. By the Reagan Administration's estimate, the tax credit proposals would cost the treasury \$50 million in fiscal 1983, an amount that would rise to \$1.3 billion by fiscal 1986.<sup>113</sup> In light of present economic policies, it does not appear that the government can afford to lose such an amount in tax revenue. Even though the recession persists with interest rates unbearably high and over ten million people unemployed, the Reagan Administration proposes a multibillion-dollar federal revenue loss.<sup>114</sup> Tuition tax credits would promote both the destruction of public education and the vertical and horizontal fragmentation of American education along religious, ideological, racial, "academic potential," and socioeconomic class lines.<sup>115</sup> This social impact would erode academic freedom by increasing the percentage of students in religiously ideologically homogeneous institutions. Such a plan would weaken the degree of security and freedom that teachers and professors have labored so long to achieve.<sup>116</sup>

Opponents further contend that a tuition tax credit amounts to unconstitutional state aid to parochial schools in violation of the doctrine of separation of church and state. Providing tuition tax credits for private education would entail complex administration, thus leading to Federal Government control of private institutions. Consequently, tuition tax credits would effectively force all taxpayers to support private and religious schools.<sup>117</sup> For this reason, in the last fifteen years, voters have decisively rejected schemes to provide tax aid or support for non-public schools in every state wide referendum and most national, regional, and Congressional district polls.<sup>118</sup>

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110. 436 F. Supp. 1314 (E.D.N.C. 1977).

111. 639 F.2d 147 (4th Cir. 1981).

112. See 51 U.S.L.W. 3192-93 (Sept. 28, 1982).

113. *Tuition Credits*; DER-BNA, *supra* note 89, at G-1.

114. CONG. DIG.—*Tax Credits*, *supra* note 9, at 25 (statements by Sen. Ernest Hollings, D-S.C., to the Senate Finance Committee).

115. Doerr, *The Packwood-Moynihan Boondoggle*, HUMANIST, Jan./Feb. 1978, at 51.

116. Doerr, *The Packwood-Moynihan Boondoggle, Part II*, HUMANIST, March/Apr. 1978, at 52.

117. *Treasury Likes Tuition Tax Credits, But Not Now*, 12 TAX NOTES at 1327 (June 8, 1981). Sen. Gary Hart (D-Colo.) comments that: "If parents use a private school, that's a voluntary choice. But if they get tax subsidies for it, then it is other taxpayers who have to pay twice."

118. In the only state-wide referendum on vouchers, Michigan voters rejected the plan 3-to-1 in 1978. In the only referendum on tuition tax credits, District of Columbia voters defeated the proposal 9-to-1 in 1981. See Doerr, *Letter to the Editor*, PROGRESSIVE, May 1982 at 7-8, where he states:

With 16,000 local school districts run by elected local boards, our public schools can be improved if parents, citizens, and taxpayers really want to improve them. That

Aside from the constitutional questions it would appear that tuition tax credits have a greater chance of adoption than education vouchers. Tuition tax credits require less administration and federal regulation than do regulated vouchers. Before Congress passes any type of tuition tax credit, however, the constitutionality of providing indirect aid to private elementary and secondary schools must be thoroughly analyzed.

### CONSTITUTIONAL ANALYSIS OF PUBLIC FUNDING OF PRIVATE EDUCATION

The constitutionality of providing Federal tax benefits or education vouchers to parents of private elementary and secondary students continues as a center of controversy. This conflict stems from the fact that most private schools are sectarian in nature.<sup>119</sup> State and federal courts have consistently held<sup>120</sup> that direct and indirect public payment of tuition to sectarian schools for education violates state and federal constitutions.<sup>121</sup> Despite these holdings, legislative attempts to provide a tax benefit to the parents of children who attend private elementary and secondary schools continue.<sup>122</sup>

The first amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>123</sup> The Supreme Court has formulated a three-part test to determine whether a statute violates the first Amendment's Establishment Clause. To pass constitutional muster, a statute which allegedly violates the Establishment Clause must: first, have a secular legislative purpose; second, have a principal or primary effect that neither advances nor inhibits religion; and third, not foster excessive government entanglement with religion.<sup>124</sup>

In *Committee for Public Education v. Nyquist*,<sup>125</sup> the United States Supreme Court held that a statute providing tuition reimbursements to

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reforms are not made easily simply testifies to the fact that the world is not a simple place.

119. For example, in *Public Funds For Public Schools of New Jersey v. Byrne*, 444 F. Supp. 1228, 1229 (D. N.J. 1978), the district court found that of the 753 non-public schools in New Jersey, 714 are religiously affiliated of which 575 or 80% are Catholic. "It is clear that only a few . . . children attend a school that is not religiously affiliated."
120. One notable exception is *Mueller v. Allen*, 676 F.2d 1195 (8th Cir. 1982) which upheld the constitutionality of a Minnesota statute authorizing a limited income tax deduction to taxpayers for certain school-related expenses incurred on behalf of dependents. The United States Supreme Court announced in early October, 1982, that they will review this decision.
121. See e.g. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Public Funds For Public Schools of N.J. v. Byrne*, 444 F. Supp. 1228 (D.N.J. 1978); *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972); *Rhode Island Fed. of Teachers, AFL-CIO v. Norberg*, 630 F.2d 855 (1st Cir. 1980) and *Minnesota Civil Liberties Union v. State*, 302 Minn. 216, 224 N.W.2d 344 (1974). See also 81 A.L.R. 2d 1311.
122. See cases, *supra* note 121.
123. U.S. CONST. amend. I. This mandate is made applicable to the states by the due process clause of the fourteenth amendment. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).
124. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
125. 413 U.S. 756 (1973).

parents of children attending elementary or secondary nonpublic schools, without restrictions on parent's use of reimbursements, violates the establishment clause. The New York statute in question<sup>126</sup> authorized a narrow class of taxpayers, those with children attending nonpublic elementary and secondary schools, to "deduct" a stipulated amount from their adjusted gross income. Although the Court observed that the "deduction" operated more as a hybrid tax "credit,"<sup>127</sup> its decision did not turn on this technical label. The Court specifically reserved a decision as to the constitutionality of a genuine tax deduction.<sup>128</sup> Applying the tripartite test, the Court concluded that the New York statute met the secular purpose test, but held that the statute failed the primary effect test. The Court stated, in dicta, that prospects for passing the excessive entanglement test appeared doubtful.<sup>129</sup> The *Nyquist* decision turned on the narrow class of taxpayers entitled to the deduction and the characterization of the benefit as a deduction.

In *Sloan v. Lemon*,<sup>130</sup> a companion case to *Nyquist*, the Supreme Court also invalidated a Pennsylvania tuition reimbursement program. The state statute at issue in *Sloan* provided reimbursement to parents for a portion of the tuition expenses incurred in sending their children to religious schools. As in *Nyquist*, the Court held that the statute violated the establishment clause by proscribing financial support of religious institutions, and could not be justified under the equal protection clause.<sup>131</sup>

The *Nyquist* and *Sloan* decisions effectively invalidate any tuition tax credit plan or voucher scheme made available only to parents who send their children to non public schools.<sup>132</sup> The issue then becomes whether any public aid to private elementary and secondary education

126. The New York statute under review provided a tuition reimbursement for parents of elementary and secondary school children who attended non-public schools. If the parent had an annual taxable income of less than \$5,000, the parent could receive a tuition reimbursement of up to \$50 for each elementary school child and up to \$100 for each secondary school student. The statute also provided for tax relief for those who did not qualify for tuition reimbursement. The law provided that taxpayers who had dependent children attending non-public elementary and secondary schools could subtract from their gross income a defined amount for each such child, but deductions were allowed for no more than three children. It was also provided that as the taxpayer's income increased, the amount permitted to be subtracted decreased. For example, if adjusted gross income was less than \$9,000, the amount to be subtracted was \$1,000; if income was between \$15,000 and \$16,999, only \$400 could be subtracted, and if income were \$25,000 or more, no subtraction could take place.

127. 413 U.S. at 789. This conclusion resulted from the fact that the amount of the deduction was predicated on and graduated according to the taxpayer's income, not actual tuition expenses incurred. See *Mueller v. Allen*, 676 F.2d 1195, 1199 (8th Cir. 1982).

128. 413 U.S. at 789, 790 n. 49; see also *Mueller v. Allen*, 676 F.2d 1195, 1199 (8th Cir. 1982); *contra Public Funds for Public Schools of N.J. v. Byrne*, 444 F. Supp. 1228, 1231 n.9 (D.N.J., 1978).

129. 413 U.S. at 791.

130. 413 U.S. 825, *reh. den.* 414 U.S. 881 (1973).

131. *Id.*

132. See, generally Note, *Government Neutrality and Separation of Church and State*, 92 HARV. L. REV. 696 (1979); and Note, *Voucher Systems of Public Education After Nyquist and Sloan: Can a Constitutional System Be Devised?*, 72 MICH. L. REV. 895 (1974) [hereinafter cited as *Voucher Systems*]. See also *Byrne*, 444 F. Supp. 1228 (D.N.J. 1978).

can pass constitutional muster?<sup>133</sup>

The Supreme Court, according to their establishment clause decisions, will not tolerate either governmentally established religion or governmental interference with religion.<sup>134</sup> Nevertheless, a state may "accommodate" religious interests when it treats religious institutions in the same manner in which it treats comparable secular institutions, such as when it provides police and fire protection to churches. The state also "accommodates" religious interests when it gives preferential treatment to religious interests in order to promote religious liberty, for example, when it exempts church schools from property taxes.<sup>135</sup> Based upon these apparent inconsistencies, it appears that a neutral tuition tax credit or voucher plan would meet constitutional muster if it incidentally "accommodated" religious interests by treating parents of private school students in the same manner as parents of public school students.<sup>136</sup> Whether or not this hypothesis withstands judicial scrutiny should be determined by the Supreme Court during its 1982-83 term in *Mueller v. Allen*.<sup>137</sup>

*Mueller v. Allen*<sup>138</sup> deals with a Minnesota statute which authorizes all taxpayers to claim tax deductions<sup>139</sup> for their dependent's tuition,<sup>140</sup> textbooks, and transportation. The Eighth Circuit Court of Appeals, in affirming the district court's ruling, held that the statute did not violate the establishment clause. Rather, the manifest purpose of the statute was to provide all taxpayers a benefit which would operate to enhance the quality of education in both public and private schools. The Eighth Circuit found the statute sufficiently neutral on its face and in its application,<sup>141</sup> and concluded that it did not have a primary effect of either

133. *Voucher Systems*, *supra* note 132.

134. *Walz v. Tax Comm'r*, 397 U.S. 664, 669 (1970).

135. *Id.*, Chief Justice Burger, who wrote the majority opinion, asserted that the tax exemptions were consistent with the state's neutral stand toward religion; *see also Voucher Systems*, *supra* note 132, at 898.

136. The Reagan Administration's proposal is not neutral since it allows tax credits only for families with students in private elementary or secondary schools. The Packwood-Moynihan Bill, however, is neutral since under it parents of any student are eligible for the tax credit.

137. 676 F.2d 1195 (8th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3220 (U.S. Oct. 5, 1982) (No. 82-195).

138. 676 F.2d 1195.

139. The deduction is limited to actual expenses incurred up to a \$500 maximum per dependent in grades K to 6 and a \$700 maximum per dependent in grades 7 to 12. Deductible expenses under subdivision 22 (Minnesota Statute § 290.09, subdivision 22) are restricted to those incurred in conjunction with school which, *inter alia*, enable a Minnesota resident to fulfill state compulsory attendance laws. *Id.* at 1196.

140. The district court found deductible tuition to include: tuition in the ordinary sense; tuition to public school students who attend public schools outside their residence school districts; certain summer school tuition; tuition charged by a school for slow learner private tutoring services; tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such schools; 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; Montessori School tuition for grades K through 12; and tuition for driver education when it is part of the school curriculum. 514 F. Supp. at 1000, and 676 F.2d at 1196.

141. The statute itself restricted deductible textbook expenses by excluding expenditures for books for courses not legally and commonly taught in public schools, books whose purpose is to



advancing or inhibiting religion.<sup>142</sup>

As in previous cases,<sup>143</sup> the plaintiff introduced statistical evidence showing that the overwhelming effect of the statute is to aid taxpayers with dependents in parochial schools. The plaintiff intended to demonstrate that the primary effect of the statute was to support and advance religion in violation of the establishment clause.<sup>144</sup> The *Mueller* court, however, rejected this argument stating that “[D]espite the apparent absolute prohibition contained in the Establishment and Free Exercise Clauses, a strict policy of total separation of church and state has been neither advocated nor enforced in this nation.”<sup>145</sup>

Accordingly, the *Mueller* court found that the statute did satisfy all three prongs of the *Lemon*<sup>146</sup> test. First, the statute had a secular purpose because it provided all taxpayers a benefit which enhances the quality of education in both public and private schools.<sup>147</sup> Second, the statute was neutral on its face and did not have the primary effect of either advancing or inhibiting religion. Any benefits flowing to religious schools by way of the incentive for taxpayers to enroll their dependents to private school remained remote and incidental. Thus, the primary benefit affected a sufficiently broad class of individual parents and dependents.<sup>148</sup> Third, the Minnesota statute did not foster excessive government entanglement with religion since any benefit to church-affiliated schools is so remote and incidental that the challenged deduction does not violate the constitutional wall separating church and state.<sup>149</sup>

The First Circuit Court of Appeals, in *Rhode Island Fed. of Teachers, AFL-CIO v. Norberg*,<sup>150</sup> held unconstitutional a statute<sup>151</sup> virtually

teach or inculcate religious tenets, doctrines or worship, and books or materials for certain extracurricular activities. 676 F.2d at 1196.

142. *Id.* at 1195.

143. *See supra* note 121; In *Mueller*, over 95% of the pupils attending nonpublic schools attended sectarian schools. *See* 676 F.2d at 1198; Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (85% of eligible students sectarian); Public Funds for Public Schools v. Byrne, 444 F. Supp. 1228 (D.N.J. 1978) (95% of eligible schools sectarian).

144. 676 F.2d at 1197.

145. *Id.*

146. 403 U.S. 602.

147. 676 F.2d at 1198.

148. *Id.* at 1204, the Court found that the Minnesota deduction available to all citizens should be viewed much the same as a charitable deduction. *See* I.R.C. § 170.

149. *Id.* at 1204, 1206. The *Mueller* court devotes most of its decision to defend the second prong of the *Lemon* test (i.e., that the primary effect of the statute neither advances nor inhibits religion) and does not deal at length with whether or not the statute fosters excessive government entanglement with religion (third prong). Nevertheless, the court states that it applied the three-pronged test of *Lemon v. Kurtzman* and holds that the statute does not violate the establishment clause. *Id.* at 1205.

150. 630 F.2d 855 (1st Cir. 1980).

151. In May 1979, Rhode Island Governor Garrahy signed an amendment to the Rhode Island income tax statute allowing as a deduction from gross income amounts paid to others for tuition, transportation and textbooks in sending dependents to public and private schools in New England. R.I. GEN. LAWS § 44-30-12(c)(2). The deduction was limited to \$500 for each dependent enrolled in kindergarten or grades one through six and \$700 for each dependent enrolled in grades seven through twelve. The term “textbooks” included only secular instructional material and equipment. *Id.* at 857.

identical to the Minnesota state law upheld in *Mueller*.<sup>152</sup> The *Norberg* Court affirmed the district court's ruling that the tuition deduction had the primary effect<sup>153</sup> of conferring a tax benefit on parents who send their children to sectarian schools. The court also held that the provision allowing the tax deduction for tuition expenses created an unconstitutional bridge between church and state.<sup>154</sup> The court found that although a deduction was available to taxpayers with dependents attending public and nonpublic schools, ninety-four percent of students attending nonpublic and tuition-funded public schools attended sectarian schools.<sup>155</sup> Consequently, the overwhelming majority of the parents eligible for the tuition deduction sent their children to sectarian schools.<sup>156</sup> The First Circuit affirmed the district court's finding that the Rhode Island statute's deduction for other instructional materials and equipment in addition to books increased the likelihood of government-church entanglements.<sup>157</sup> Considering the virtually identical statutes involved in *Mueller* and *Norberg* and the national significance of tuition tax credits, the Supreme Court must decide in *Mueller* whether statutes such as those in Rhode Island and Minnesota can survive constitutional scrutiny.<sup>158</sup>

In *Mueller v. Allen*, the Supreme Court will have an opportunity to decide the constitutionality of charitable deductions<sup>159</sup> made available to all citizens. The Court will inevitably focus on the second prong of the tripartite *Lemon* test (i.e. the primary effect on the statute must neither advance nor inhibit religion). Whether the Minnesota statute has the primary effect of advancing religion depends upon several factors. First, the Supreme Court's decision in *Nyquist* must be distinguished.<sup>160</sup> The tax benefit in *Nyquist* was given only to those parents with children in private schools while in *Mueller*, the statute afforded benefits to *all* parents with school children.<sup>161</sup> Second, the Court must

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152. 676 F.2d at 1200.

153. The second prong of the *Lemon* test is that the primary effect of the statute must neither advance nor inhibit religion.

154. 630 F.2d at 855. This is the third prong of the *Lemon* test—excessive government entanglement with religion is prohibited.

155. 630 F.2d at 859.

156. 630 F.2d at 861.

157. *Rhode Island Federation of Teachers v. Norberg*, 479 F. Supp. 1364, 1372 (D.R.I. 1979). The court reasoned that the government would have to supervise the parochial schools themselves to ensure that the instructional materials were not used in the course of religious instruction.

158. 676 F.2d at 1201.

159. 676 F.2d at 1205. This decision will reveal the nature of the "cloak of neutrality" exposed in *Nyquist*. There the Court specifically excepted from its ruling any decision as to whether a "genuine tax deduction" is constitutionally acceptable under the "neutrality" test in *Walz v. Tax Commission*.

160. The *Norberg* court held that it could not be distinguished from *Nyquist*. 630 F.2d at 861.

161. 676 F.2d at 1203. The New York statute in *Nyquist* can be distinguished from the Minnesota and Rhode Island statutes on the following basis: (1) the statute in *Nyquist* operated as a tax credit, not as a true deduction; and (2) the tax benefits in *Nyquist* were limited to the class of parents of private school children, as opposed to the broad class of parents with dependents in both public and nonpublic schools benefited under the Minnesota and Rhode Island statutes.

determine whether the Minnesota statute's applicability to parents of public as well as nonpublic school students represents "mere window dress"<sup>162</sup> to cover up the primary effect of advancing religion or whether its facial neutrality satisfies the primary effect test.<sup>163</sup> It appears that, although the Minnesota statute would benefit parents who enroll their children in sectarian schools, it remains neutral on its face and only indirectly benefits religious schools.

The third prong of the *Lemon* test (i.e. the statute must not foster excessive government entanglement with religion) may present a significant barrier to the Minnesota statute's constitutional validity. The issue arises, however, with the state income tax deduction for textbook expenses rather than tuition expenses. In this context, it appears that a deduction for secular textbooks for all parents falls within the constitutional protection of *Board of Education v. Allen*.<sup>164</sup>

### CONCLUSION

The Supreme Court's review of *Mueller v. Allen* gives the Court an opportunity to provide a standard for the recurring problem posed by legislative attempts to provide a tax benefit to the parents of children who attend private elementary and secondary schools. Whether the Supreme Court will draw a "bright line" of guidance<sup>165</sup> through the gray area lying between constitutional tax exemptions in *Walz v. Tax Commission* and unconstitutional tax credits found in *Nyquist* remains questionable. It appears clear that a majority of the Court favors a stricter degree of separation of church and state to avoid the evils of history.<sup>166</sup> Analysis of the Court's acceptance of a "neutrality-accommodation" theory regarding religious liberty, however, reveals that the Court could uphold the charitable deduction operating in *Mueller*.

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162. 409 F. Supp. at 1371.

163. 676 F.2d at 1197, where the *Mueller* court states:

Although a law may be one respecting the establishment of religion while aiding all religions equally and without promoting a state religion, *see* *Everson v. Board of Education*, 330 U.S. 1 (1947), a law that indirectly benefits religion or religious institutions is not invalid *per se* on those grounds. *See, e.g.*, *Wolman v. Walter*, 433 U.S. 229, (1977) (law providing loan of textbooks purchased with state funds and provision of diagnostic services to nonpublic schools upheld).

164. 392 U.S. 236 (1968), which upheld a law providing for loan of state textbooks to nonpublic schools.

165. 413 U.S. 756, 760-61 (observation by J. Powell).

166. 630 F.2d at 863 (Judge Campbell's comment in this concurring and dissenting opinion). In this regard, the Supreme Court's decisions in *Goldsboro Christian Schools Inc. v. U.S.*, No. 81-1; and *Bob Jones University v. U.S.*, No. 81-3, should foretell the Court's decision in *Mueller*. Should the Court uphold the IRS's authority to confer tax breaks on racially discriminatory private schools, it would indicate that the Court is focusing on the racial neutrality of statutes and not construing a church-school's indirect benefit from such a statute, whether I.R.C. § 501(c)(3) or a tuition tax credit proposal, as primarily advancing religion. *See* 51 U.S.L.W. 3192-3193 (Sept. 28, 1982) (No. 51-12).

Furthermore, civil rights forces won a significant victory when the Senate Finance Committee added a key provision to the Reagan Administration's proposal blocking the tax credit from taking effect until either Congress or the Supreme Court acts to prohibit tax-exempt status for segregated schools.

The Court's eventual decision will affect the ultimate success of efforts by the Reagan Administration and supporters of the Packwood-Moynihan Bill to provide special federal tax credits to help offset the costs of private education. The courts have consistently struck down similarly targeted credits in *Nyquist*,<sup>167</sup> *Public Funds for Public Schools of New Jersey v. Byrne*,<sup>168</sup> *Minnesota Civil Liberties Union v. State*<sup>169</sup> and other cases. The Packwood-Moynihan proposal, on the other hand, appears capable of passing constitutional muster if the Court upholds the Minnesota tuition tax statute in *Mueller*. Unlike the Reagan Administration's proposal, the Packwood-Moynihan bill would allow credits for *all* parents with children in schools, whether religious, non-religious, public or private.

For the time being, those who support tax credits analogize themselves to the NAACP in 1954 before *Brown v. Board of Education*<sup>170</sup> obliterated the "separate but equal" doctrine of *Plessy v. Ferguson*.<sup>171</sup> Whether *Mueller v. Allen* will play the role of *Brown*, and *Nyquist* the role of *Plessy* will remain unanswered until the Supreme Court performs the final act.

*Shawn Timothy Newman\**

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167. 413 U.S. 756 (1973).

168. 444 F. Supp. 1228 (D.N.J. 1978).

169. 302 Minn. 216, 224 N.W.2d 344 (1979).

170. 347 U.S. 483 (1954).

171. 163 U.S. 537 (1896).

\* B.S.L.H.R., The Ohio State University, 1980; J.D. Candidate, Notre Dame Law School, 1983.