Journal of Legislation

Volume 11 | Issue 1 Article 8

1-1-1984

Mueller v. Allen: A Constitutional Crosswalk to Federal Tutition Tax Credits;Note

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MUELLER v. ALLEN: A CONSTITUTIONAL CROSSWALK TO FEDERAL TUITION TAX CREDITS

INTRODUCTION

Quality education for schoolchildren ranks among this nation's top priorities. The Supreme Court's recent decision in *Mueller v. Allen*[1] and previous case law regarding public aid to private education have identified certain common concerns of the Court. The current legislative response to these concerns is Senate Bill 528.[2] Labeled the "Educational Opportunity and Equity Act of 1983," S. 528 would provide a tax credit to parents who pay tuition to private elementary and secondary schools. While the Minnesota statute[3] upheld in *Mueller* differs significantly from S. 528, recent first amendment decisions suggest that the Supreme Court is moving toward a more permissive interpretation of the Establishment Clause.[4] This shift in the Court's interpretation of the Establishment Clause gives constitutional viability to the Reagan Administration's tuition tax credit proposal, S. 528.

PRIMARY EFFECT: A HISTORICAL BACKDROP

Examining the Supreme Court's past decisions regarding public aid to private education illustrates its change in view and indicates its future trend regarding public aid to private institutions. To pass constitutional muster, S. 528 must meet the shifting definition of "secular

1. — U.S. —, 103 S. Ct. 3062 (1983).
2. S. 528, 98th Cong., 1st Sess., 129 CONG. REC. S1335-38 (daily ed. Feb. 17, 1983). The Reagan Administration's bill, was sponsored by Senator Dole (R-Kan.). Co-sponsors of this bipartisan bill include Senators Robert Packwood (R-Or.), Daniel P. Moynihan (D-N.Y.), William V. Roth, Jr. (R-Del.), Alfonse M. D'Amato (R-N.Y.) and Roger W. Jepsen (R-Iowa).
3. 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, 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.
4. The Establishment Clause of the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

effect." The Court defined "secular effect" in *Lemon v. Kurtzman*[5] as containing three elements:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement" with religion.[6]

The Supreme Court has placed varying degrees of emphasis on these elements.[7]

Opponents of tuition tax credit legislation argue that legislation authorizing tuition tax credits violates the Constitution since the Supreme Court in an earlier decision, *Committee for Public Education and Religious Liberty v. Nyquist*,[8] struck down a statute authorizing financial aid programs for non-public elementary and secondary schools. The New York statute provided for the following:

> 1) direct grants to "qualifying" non-public schools to ensure the health, welfare and safety of enrolled students through maintenance and repair of school facilities and equipment;[9] 2) a tuition reimbursement plan for parents with an annual income of less than $5,000 whose children attend non-public elementary or secondary schools;[10] and 3) tax relief for parents who did not qualify for the reimbursement plan.[11]

The Supreme Court found that these New York programs violated the second prong of the *Lemon* test because they advanced religion. Justice Powell, writing for the majority, emphasized that the effect of the maintenance and repair provisions and the reimbursement plan was "unmistakenly to provide desired financial support for nonpublic, sectarian institutions."[12] Moreover, the Court held that although the reimbursement grants went directly to the parents rather than the schools, aid to religion was not attenuated.

Furthermore, the Court found the New York tax relief plan, established to benefit parents who did not qualify for the reimbursement plan, suspect because the tax deduction was wholly unrelated to the dollar amount the parent actually expended for tuition.[13] While the statute was intended to provide each family with a carefully estimated net benefit comparable to the tuition grant accorded lower income families, it actually granted middle income parents tuition grants thinly

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5. 403 U.S. 602 (1971).
6. *Id.* at 612-613.
7. As Justice Powell pointed out in Hunt v. McNair, 413 U.S. 734, 741 (1973), the elements set out in *Lemon* are "no more than helpful signposts."
8. 413 U.S. 756 (1973).
9. N.Y. EDUC. LAW. §§ 549-553 (McKinney Supp. 1982-1983).
10. *Id.* §§ 559-563 (McKinney Supp. 1982-1983).
11. N.Y. TAX LAW § 612(j) (McKinney 1975).
12. *Nyquist*, 413 U.S. at 783.
13. *Id.* at 790.

disguised as a tax benefit.[14] The Court held, in effect, that any state aid to private schools or to parents of private schoolchildren ultimately benefited religious schools and resulted in an unconstitutional advancement of religion.

Prior to *Nyquist*, the Supreme Court had applied the "primary secular effect" test in analyzing the constitutionality of a statute. Under the "primary secular effect" criteria, legislation would not be deemed to contravene the Establishment Clause as long as the legislation had a "primary effect that neither advances nor inhibits religion."[15] As late as 1971, the Court reiterated its application of the primary secular effect test. In *Tilton v. Richardson*,[16] the Court upheld construction grants to religious colleges, emphasizing that:

> [t]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). . . . The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal* or *primary* effect advances religion.[17]

In *Nyquist*, however, the Supreme Court radically departed from the "primary secular effect" test and adopted an "any effects" test.[18] Justice Powell maintained that, "our [previous] cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's [sic] police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion."[19] Thus, under the *Nyquist* rationale, legislation which met the "primary secular effect" test might still be deemed unconstitutional if the legislation had any effect of advancing religion.[20]

Moreover, the Court applied the "any effects" test in *Meek v. Pittenger*,[21] and held provisions of a Pennsylvania statute authorizing

14. Thus, a parent who earned less than $5,000 was entitled to a tuition reimbursement of $50 for a child attending an elementary nonpublic school, while a parent who earned over $5,000 but less than $9,000 was entitled to an equivalent tax deduction. *See* Nyquist, 413 U.S. at 790.

15. School District v. Schempp, 374 U.S. 203, 222 (1963) (quoting Everson v. Board of Education, 330 U.S. 1 (1947)).

16. 403 U.S. 672 (1971).

17. *Id.* at 679 (emphasis added).

18. *See* Minnesota Civil Liberties Union v. State, 302 Minn. 216, 224 N.W.2d 344 (1974), *cert. denied*, 421 U.S. 988 (1975), where the Minnesota Supreme Court struck down a state statute authorizing tuition tax credits for parents of children attending nonpublic elementary or secondary schools. Looking to *Nyquist*, the Minnesota Court emphasized that "[i]n applying the 'primary effects test', we must be guided by the realization . . . that this is *no longer* a primary effects test, but an 'any effects' test." *Id.* at 232, 224 N.W.2d at 353 (emphasis added).

19. 413 U.S. at 783 n.39.

20. Young and Tigges, *Federal Tuition Tax Credits and the Establishment Clause: A Constitutional Analysis*, 28 CATH. LAW. 35, 42 (1983). Prior to the *Mueller* decision Young and Tigges acknowledged the Court's shifting definition of secular effect.

21. 421 U.S. 349 (1975).

loans to schools for instructional materials and equipment unconstitutional.

Nevertheless, this test did not survive. Two years later, in *Wolman v. Walter*,[22] the Court began to "whittle away" at the *Nyquist-Meek* "any effects" test. In *Wolman v. Walter* the Court struck down provisions of an Ohio statute authorizing loans of instructional materials and equipment to nonpublic schools. The portions of the statute that provided for furnishing textbooks, standardized testing services, and diagnostic and therapeutic services to nonpublic schoolchildren were deemed constitutional.[23] The Ohio statute bore a striking resemblance to the Pennsylvania statute invalidated in *Meek*, yet their outcomes differed. The disparity in their outcomes illustrates the Court's movement away from the "any effects" test.

The Court's movement away from the "any effects" test flourished in *Committee for Public Education and Religious Liberty v. Regan*.[24] The *Regan* decision upheld a New York statute authorizing the use of state funds to reimburse nonpublic schools for costs incurred in administering state-required tests. Although the reimbursement plan provided a direct and immediate benefit to sectarian schools that would have violated the "any effects" standard set forth in *Nyquist*, the direct aid to sectarian schools was not deemed unconstitutional.[25] Thus, *Regan* marked the Court's return to the "primary secular" effect test. As this line of cases illustrates, the Supreme Court has undergone a dramatic shift regarding public assistance to private education.[26] The Court's increasingly tolerant attitude toward public aid to nonpublic schools set the stage for the recent *Mueller v. Allen* decision.

THE *MUELLER v. ALLEN* DECISION

Mueller v. Allen[27] sustained a Minnesota statute authorizing a state income tax deduction to parents for "tuition, textbooks and transportation" costs that their dependents incur while attending elementary or secondary schools. The statute permits parents of either public or pri-

22. 433 U.S. 229 (1977).
23. *Id.*
24. 444 U.S. 646 (1980). Ironically, the author of the majority opinion, Justice White, was the vehement dissenter in *Nyquist*.
25. *Id.* at 661-662.
26. As the majority in *Regan* noted:

> This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools . . . . What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

Id. at 662.
27. — U.S. —, 103 S. Ct. 3062 (1983).

vate schoolchildren to take the deduction, but it does not allow any parent to take a deduction for textbooks used in teaching religious doctrines. Nor does the statute allow deductions for expenses children incur by participating in extracurricular activities.[28] In sustaining the Minnesota statute, the *Mueller* Court used the three-prong test enunciated in *Lemon v. Kurtzman*.[29] The first prong of the *Lemon* test, "secular effect," and the third prong, "excessive entanglement," met little resistance from the Court, whereas the second prong, "primary effect," posed serious constitutional questions.

In *Mueller*, the Court dismissed arguments concerning the Minnesota statute's secular purpose. The Court admitted its "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."[30] The valid secular purposes the Court discerned from the face of the Minnesota statute included: the necessity of a well-educated populace, regardless of who educates them; the continued health of private schools relieving the public schools of the added burden of educating a substantial number of children, to the benefit of all taxpayers; and the preservation of private schools as a

28. Both the district court and the court of appeals found that the Minnesota statute permitted a deduction for 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 schools.
    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.

    Mueller, 514 F. Supp. 998, 1000 (1981). 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 classes. [sic]
    3. Ice skates rental fee paid to the school.
    4. Rental fee paid to the school for calculators for mathematics classes.
    5. Costs of home economics materials needed to meet minimum requirements.
    6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
    7. Costs of supplies needed to meet minimum requirements of art classes.
    8. Rental fees paid to the school for musical instruments.
    9. Cost of pencils and special notebooks required for class.

    Id. The court of appeals accepted this finding. *Mueller*, 676 F.2d 1195, 1196 (1982).

29. 403 U.S. 602 (1971). Admittedly, the majority in *Mueller* cautioned that previous cases have rendered the *Lemon* test less important. This caveat is crucial to understanding the Court's willingness to apply alternative standards to problems involving the Establishment Clause. *Marsh v. Chambers*, — U.S. —, 103 S. Ct. 3330 (1983), illustrates the Court's application of alternative standards. In *Marsh*, the Court focused on the Nebraska legislature's tradition of opening each legislative session with a prayer said by a state-paid chaplin, and totally ignored the *Lemon* test.

30. *Mueller*, 103 S. Ct. at 3066.

"benchmark" for public schools.[31]

Addressing the second prong of the *Lemon* test, the Court concluded that the Minnesota statute had a primary secular effect.[32] First, and most importantly, the Minnesota statute was merely a single tax deduction in an overall comprehensive tax scheme. Legislatures traditionally have been given broad discretion in their formation of tax statutes.[33] Therefore, the Court hesitated to find this tax deduction unconstitutional.

Second, in addressing the second prong of the *Lemon* test, the *Mueller* Court noted that the parent rather than the school claimed the deduction. The Court found the position of the parent as an independent decision-maker constitutionally significant. Under this "arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children."[34] The insulating effect of the parent prevents the conferral of the "imprimatur of State approval."[35] This contention directly contradicts *Nyquist* in which the Court viewed parents as a mere conduit for direct aid to religious schools.[36] In *Mueller*, the parents, as the direct recipients of the aid, act as a buffer separating church and state.

This attenuated financial benefit to the sectarian schools avoids the evils the Establishment Clause was designed to prevent. The *Nyquist*

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31. The Court in *Mueller* stated:

> 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.

Id. at 3067, (quoting Wolman v. Walter, 433 U.S. 229, 262) (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part).

32. *Mueller*, 103 S. Ct. 3071.

33. Regan v. Taxation with Representation of Washington, — U.S. —, 103 S. Ct. 1997, 2002 (1983), which quoted with approval Madden v. Kentucky, 309 U.S. 83, 87-88, (1940) (footnotes omitted) and stated:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

The majority in *Nyquist* did not defer to the New York Legislature since the Court failed to recognize the statute as a legitimate tax measure. *See Nyquist*, 413 U.S. at 790, n.49 (1973).

34. *Mueller*, 103 S. Ct. at 3069.

35. *Id.* at 3069, (quoting Widmar v. Vincent, 454 U.S. 263 at 275 (1981)). As Justice Rehnquist observed in *Mueller*, the *Nyquist* Court agreed that the beneficiary to whom the benefits were to flow is a material consideration in their analysis of the Establishment Clause.

36. *Nyquist*, 413 U.S. at 791.

majority was concerned that government involvement in religious education would "strain a political system to the breaking point."[37] The *Mueller* majority, however, did not find this argument persuasive. As the Court points out:

> 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 [90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697] (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 [sic] such risk seems entirely tolerable in light of the continuing oversight of this Court.[38]

With time, the risk of religious control over our democratic processes has dissipated.

The Court did not consider the "direct and immediate" effect of the Minnesota statute on religion in the *Mueller* decision. In fact, the Court concedes 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."[39] This "direct and immediate" aid to religious schools is precisely the type of aid that the *Nyquist* Court abhorred.[40] Thus, the *Mueller* Court considered conferral of substantial benefits upon religious institutions an insufficient reason for declaring the Minnesota statute unconstitutional.[41]

Third, the *Mueller* Court relied on the availability of the deduction to all parents. The Court did not assert, however, that the availability to all parents was essential to constitutionality. Furthermore, the Court rejected a statistical analysis of beneficiaries. Justice Rehnquist, writing for the majority, declared, "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[42] Therefore, a statute's constitutionality hinges not on a statistical analysis but upon whether it provides benefits to a broad spectrum of groups. "[T]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."[43]

The third prong of the *Lemon* test, excessive entanglement, did not

37. *Mueller*, 103 S. Ct. at 3069 (quoting Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 796 (quoting Walz v. Tax Comm'ns, 397 U.S. 664, 694 (1970))).
38. *Mueller*, 103 S. Ct. at 3069 (quoting Wolman v. Walter, 433 U.S. at 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part).
39. *Mueller*, 103 S. Ct. at 3069.
40. *Nyquist*, 413 U.S. at 783, n.39.
41. The *Mueller* Court found that the Minnesota statute did not have "the primary effect of advancing the sectarian aims of the nonpublic schools." 103 S. Ct. at 3067 (quoting Committee for Public Education v. Regan, 444 U.S. 646, 662 (1980)). This language supports the earlier proposition that the Court has returned to its application of the "primary effect" test.
42. 103 S. Ct. at 3070.
43. *Id.* at 3068, (quoting Widmar v. Vincent, 454 U.S. 274 (1981)).

trouble the *Mueller* Court. The Court's only concern was "whether particular textbooks qualify for a deduction."[44] Since Minnesota statute section 290.09(22) does not allow a deduction for textbooks and instructional materials used to teach religion, state officials were required to determine which textbooks would qualify for the deduction. The Court found that this determination did not excessively entangle church and state.[45]

THE ADMINISTRATION'S PROPOSAL: SENATE BILL 528

The *Mueller* decision lays a constitutional foundation for the Reagan Administration bill, S. 528. The bill amends the Internal Revenue Code to permit an individual taxpayer to claim a credit of fifty percent of the tuition paid to full-time private primary or secondary schools.[46] Additionally, the bill allows a taxpayer to claim a maximum credit of $100 in 1983, $200 in 1984, and $300 in 1985 and subsequent years.[47] The tax credit, however, would be reduced for families with adjusted gross income exceeding $40,000 ($20,000 for married individuals filing separately) and would be eliminated for families whose adjusted gross income exceeds $50,000.[48]

In *Nyquist*, the Court determined that the Constitution recognizes no significant difference between a tax credit and a tax deduction.[49] Generally, a tax credit is an amount which is subtracted from the computed tax itself, in contrast to a deduction which is generally subtracted from gross income to arrive at adjusted gross income or taxable income.[50] Justice Powell, writing for the majority in *Nyquist*, stated:

> We see no reason to select one label over another, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it. As Mr. Chief Justice Burger's opinion for the Court in *Lemon v. Kurtzman*, 403 U.S. at 614, notes, constitutional analysis is not a "legalistic minuet in which precise rules and forms must govern." Instead we must "examine the form of the relationship for the light

44. 103 S. Ct. at 3071. The Minnesota statute defines "textbooks" as:
> 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, driver's education, or programs of a similar nature.

Minn. Stat. § 290.09(22) (1982).

45. In Board of Education v. Allen, 392 U.S. 236 (1968), the Supreme Court upheld the loan of secular textbooks to parents of children attending nonpublic schools, although state officials determined whether particular books were secular. This process, similar to the one employed in *Mueller*, was held not to violate the Establishment Clause.

46. S. 528, 98th Cong., 1st Sess. § 44I(a),(b)(1)(C) (1983), 129 CONG. REC. S1335-36, § 44H(a), (b)(1)(C) (daily ed. Feb. 17, 1983).

47. *Id.* § 44I(b).

48. *Id.*

49. 413 U.S. at 790 n.49.

50. BLACK'S LAW DICTIONARY 331 (5th ed. 1979).

that it casts on the substance."[51]

The *Nyquist* Court reserved the question of whether a "genuine tax deduction" would be constitutionally acceptable.[52] The *Mueller* Court addressed this question, and held that a tax deduction is constitutionally permissible.[53]

Similar to the tax deduction allowed by the Minnesota statute in *Mueller*, S. 528 contains tax credit provisions directly related to the amounts parents actually spend on tuition.[54] Therefore, S. 528 avoids the pitfall of *Nyquist* in which the Court deemed unconstitutional a reimbursement plan unrelated to the amount of tuition paid by parents.[55] Unlike the New York statute in *Nyquist*, S. 528 does not conceal an outright grant under the guise of a tax refund.

An amendment to S. 528 proposes to add a refundability provision allowing low income parents who incur little or no income tax liability to receive a payment equal to the amount of the unused credit.[56] This refundability amendment resembles the reimbursement plan struck down in *Nyquist*. Thus, addition of this amendment would place S. 528 in constitutional jeopardy.

The final substantive difference between S. 528 and the Minnesota deduction permitted in *Mueller* lies in the breadth of the class benefitted. The Minnesota statute allowed all taxpayers with children in public or private schools a deduction, whereas S. 528 authorizes a credit to all tuition-paying taxpayers with children in private schools.[57] Thus, S. 528 raises the crucial question of whether it is facially neutral over a broad spectrum of groups. Although the bill identifies a different class of beneficiaries than the Minnesota statute, this difference is not necessarily fatal to the bill's constitutionality. The *Mueller* decision did not hinge upon the inclusion of all parents as beneficiaries. Rather, the Court focused upon the breadth of the class benefitted and other factors as elements essential to constitutionality. These elements distinguished *Mueller* from *Nyquist* and contributed to the Court's finding the Minnesota plan constitutional.[58]

The *Mueller* Court held that the Minnesota statute accorded a tax deduction to a sufficiently broad spectrum of people.[59] Senate Bill 528 applies to an equally broad spectrum of people. Private school parents benefitted by S. 528 include taxpayers motivated by their diverse beliefs and a desire to provide quality education for their children. Of the approximately eleven percent of American elementary and secondary

51. 413 U.S. at 789.
52. *Id.* at 790, n.49.
53. *Mueller*, 103 S. Ct. at 3067, n.6.
54. S. 528, 98th Cong., 1st Sess. § 44I(a) (1983), 129 CONG. REC. S1335-36, § 44H(a) (daily ed. Feb. 17, 1983).
55. *Nyquist*, 413 U.S. at 756.
56. R. Lyke, update of CRS Report Issue Brief IB81075, Tuition Tax Credits 5 (Aug. 1, 1983).
57. S. 528, 98th Cong., 1st Sess., § 3(a) and § 44I(d)(13)(B) (1983).
58. *Mueller*, 103 S. Ct. at 3067-69.
59. *Id.* at 3069.

schoolchildren attending private schools,[60] sixteen percent attend nonsectarian schools.[61] Thus, S. 528 benefits a broader spectrum of taxpayers than merely those who enroll their children in religious-affiliated schools.

Although the *Mueller* Court was reluctant to rely on a statistical analysis to determine the constitutionality of a statute that applies to all public and private school parents, a statistical analysis is necessary to determine the breadth of the class benefitted by a statute that applies only to private school parents. As the *Mueller* dissent points out, the Minnesota statute overwhelmingly benefits parents of children in private schools.[62] Therefore, the constitutionality of S. 528 should not hinge on whether its tax benefits flow to all parents with schoolchildren.

Furthermore, S. 528 should not be found unconstitutional since in previous cases involving the Establishment Clause, such as *Everson*,[63] *Allen*,[64] and *Wolman*,[65] the Supreme Court held state programs that solely benefitted private schoolchildren constitutional. Seemingly, if a state statute which solely applies to private schoolchildren can be adjudged constitutional, a federal statute aimed at private school parents nationwide must be constitutional as well.

Moreover, deference to Congress has historically influenced judicial decision. As the Supreme Court has noted:

> The customary deference accorded the judgments of Congress is certainly appropriate when . . . Congress specifically consider[s] the question of the Act's constitutionality.[66]

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60. *Congressionally Mandated Study of School Finance, A Final Report to Congress from the Secretary of Education*, 2 PRIVATE ELEMENTARY AND SECONDARY EDUCATION i (1983).
61. *Id.* at 6.
62. *Mueller*, 103 S. Ct. at 3074. As the dissent emphasized:
> Contrary to the majority's suggestion, the bulk of the tax benefits afforded by the Minnesota scheme are enjoyed by parents of parochial school children not because parents of public school children fail to claim deductions to which they are entitled, but because the latter are simply unable to claim the largest tax deduction that Minnesota authorizes. Fewer than 100 of more than 900,000 school-age children in Minnesota attend public schools that charge a general tuition. Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools. Parents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children. Yet parents who pay at least $700 in tuition to nonpublic sectarian schools can claim the full deduction even if they incur no other educational expenses.

Id. at 3074.
63. 330 U.S. 1 (1947).
64. 392 U.S. 236 (1968).
65. 433 U.S. 229 (1977).
66. *See* Rostker v. Goldberg, 453 U.S. 57, 64 (1981), where the Court stated:
> The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951) (concurring opinion), we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."

Given the broad spectrum which S. 528 encompasses, the Constitution does not require extension of the tax benefit to parents who pay tuition to public schools.[67]

The *Mueller* Court did not consider excessive entanglement, the third prong of the *Lemon* test, a major factor in its decision. Since S. 528 and *Mueller* both involve tax measures, excessive entanglement should not command the Court's attention with regard to S. 528. Generally, a comprehensive, discriminating and continuing state surveillance constitutes excessive entanglement.[68] Senate Bill 528 does not encourage such surveillance.

The anti-discrimination provisions in S. 528, however, should be analyzed as to whether they excessively entangle church and state. These provisions give the Attorney General authority to ensure that tax credits are not taken by parents with children attending racially discriminatory schools. Furthermore, S. 528 provides the Attorney General with standards by which to determine whether a school violates the anti-discrimination provisions. The Court's decisions in *Bob Jones University v. United States*[69] and *Committee for Public Education and Religious Liberty v. Regan*[70] do not indicate that merely vesting en-

Id. at 64.

67. Senator David Durenberger (R-Minn.) plans to offer an amendment extending the tax benefit of S. 528 to parents who pay tuition to public schools. This amendment is not necessary for S. 528 to pass muster because the Administration bill already applies to a broad enough spectrum of individuals.

68. *Mueller*, 103 S. Ct. at 3071, (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

69. In Bob Jones University v. United States, 103 S. Ct. 2017 (1983), the Court upheld the Internal Revenue Service's revocation of the University's tax exempt status because of its racially discriminatory standards. This resulted from a thorough investigation by the IRS into the admission policies of this private university. Since the Court sanctioned such activity without raising the issue of excessive entanglement, it appears that the section in S. 528 authorizing the Attorney General to enforce anti-discrimination provisions does not constitute excessive entanglement.

70. The *Mueller* opinion gave little consideration to the third prong of the *Lemon* test, excessive entanglement. The Minnesota tax deduction deserved no more attention because the only question it presented was whether the state was excessively entangled in church affairs when it determines the secular content of books that parents buy for use at sectarian schools and then claim a deduction for the purchase price on their personal income tax forms. It has been suggested that S. 528 may raise the excessive entanglement issue because the bill authorizes the Attorney General to seek a declaratory judgment against any private school which practices racial discrimination. (*See* S. 528 § 4, 98th Cong., 1st Sess., 129 CONG. REC. S1335, 1337 (daily ed. Feb. 17, 1983)).

This declaratory judgment would deny a tuition tax credit to the parents of children attending such a school. The Attorney General may initiate this process either upon his receipt of an allegation of discrimination filed against an institution or upon the Attorney General's finding of good cause. Although these methods may require contact someday between the Attorney General and private sectarian schools, these provisions do not excessively entangle church and state. Under the first method, the Administration bill defines "allegations of discrimination" and gives a detailed procedure for the Attorney General to follow in his actions against a school. As the Court has observed in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 660 (1980), a "process (which) is straightforward and susceptible to . . . routinization" does not on its face suggest excessive entanglement and the Court is not prepared to read into such a statute as inevitable "the bad faith upon which any future excessive entanglement would be predicated." *Id.* at 660. However, the second method, triggered by the Attorney General's finding of good cause, is not so detailed. The bill does not define "good cause" nor does it prescribe how the Attorney General shall arrive at such a determination. Nonetheless, in leaving such matters to the Attor-

forcement authority in the Attorney General and prescribing required procedures by which to examine discrimination will excessively entangle church and state.

CONCLUSION

Numerous factors will play a role in the determination of the constitutionality of S. 528. Considering these factors, this bill would survive constitutional scrutiny. First, it is a legitimate tax measure conferring benefits upon a broad spectrum of groups with a valid secular purpose, that of advancing educational opportunity. Second, as *Mueller v. Allen* illustrates, the Supreme Court has adopted a more permissive attitude regarding separation of church and state. Third, the Court has shown a willingness to tolerate a greater degree of government involvement in private education. Therefore, S. 528 should pass constitutional review.

Proponents of S. 528 should not deliberate over amendments that do not bolster its constitutionality. Rather, they should advance the bill to enactment.[71] Preserving parental choice and enhancing educational opportunity are common goals of all Americans.

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ney General's discretion, the bill does not engender excessive entanglement. In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court declined to read into a federal statute an unconstitutionally broad authority in "the absence of a clear expression of Congress' intent" to intrude upon areas protected by the first amendment Religion Clauses. *Id.* at 507. Since Congress did not set forth such a clear expression of intent, S. 528 does not excessively entangle the state in church affairs.

71. Shortly after the authors completed this note, S. 528 was defeated in the United States Senate by a vote of 59 to 38, 129 CONG. REG. S16269, S16300 (daily ed. Nov. 16, 1983).

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