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The Constitutionalcy of Tax Relief for Parents of Children Attending Public and Nonpublic Schools

The persistent desire of lawmakers to assist nonpublic schools and the parents and students who patronize those schools has manifested itself in various statutes providing state aid to nonpublic education. Opponents of such aid have been equally persistent in asserting that these statutes violate the establishment clause of the first amendment. Although the United States Supreme Court has invalidated a number of state aid provisions, the Court has upheld several state stat-

1. Although public aid to nonpublic schools raises many policy issues, this Note only addresses the constitutional implications of state aid to nonpublic sectarian schools. One reason for this focus lies in the overwhelmingly sectarian nature of American nonpublic schools; by the early 1960's, more than 90% of the 5.6 million American children enrolled in nonpublic schools attended Catholic schools. Morgan, The Establishment Clause and Sectarian Schools: A Final Installment, 1973 Sup. Ct. Rev. 57, 58. Another reason for restricting the scope of this Note to nonpublic sectarian schools is suggested by the following testimony of Professor Leo Pfeffer before the House Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor:

[T]here is no constitutional barrier to governmental financing of private schools that are not religious. But were the measures here under consideration limited to secular preparatory schools, such as Eton and Harrow, that cater exclusively to high-income families, it is doubtful that we would be induced to introduce such a measure.


utes providing aid to sectarian schools or to children attending such schools. The Court's criteria for distinguishing between permissible and impermissible state aid have been less than clear, however. Despite the Court's professed use of a three part test, reliable principles have been difficult to extract from its school aid decisions.

The latest chapter in the continuing controversy over state aid to sectarian schools has arisen in the context of tax relief for school-related expenses. Rhode Island and Minnesota enacted virtually identical laws providing tax benefits to parents of children attending both public and nonpublic schools.

nance and repair grants to nonpublic schools); Lemon v. Kurtzman, 403 U.S. 602 (1971) (direct payments to nonpublic school teachers in amounts up to 15% of total salary for rendering educational services).


7. See infra notes 25-32 and accompanying text. One commentator has observed that "[p]redicting the ultimate outcome of a school aid case is little more than a guessing game." Hunter, The Continuing Debate over Tuition Tax Credits, 7 HASTINGS CONST. L.Q. 523, 544 (1980).

8. See infra notes 33-56 and accompanying text.

9. See infra notes 25-32 and accompanying text.

10. Compare Minn. Stat. § 290.09(22) (1982), which provides a deduction from gross income for 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.

with R. I. Gen. Laws § 44-30-12(c)(2) (1980), which provides a deduction from federal adjusted gross income for (amounts) paid to others, not to exceed five hundred ($500) dollars for each dependent in kindergarten through sixth grade and seven hundred ($700) dollars for each dependent in grades seven through twelve
Both statutes create deductions from gross income for tuition, textbook, and transportation expenses of each dependent attending any eligible public or nonpublic elementary or secondary school. Taxpayers in both states attacked the constitutionality of the statutes, arguing that they violated the establishment clause because they provided impermissible aid to sectarian schools. The challenge succeeded in Rhode Island when the First Circuit invalidated the tax relief in *Rhode Island Federation of Teachers v. Norberg*. The Minnesota tax provision, however, was upheld by the Eighth Circuit in *Mueller v. Allen*. The United States Supreme Court has agreed to ad-
dress this direct conflict between the circuits by granting certiorari in Mueller.17

This Note addresses the constitutionality of a statutory scheme that provides deductions from gross income for tuition, textbook, and transportation expenses to all parents with dependents attending elementary and secondary schools. Part I examines the Court's current approach to establishment clause challenges to state aid to religious education. Part II presents the responses of the First and Eighth Circuits to the attacks on the constitutionality of the Rhode Island-Minnesota deduction scheme. Part III analyzes those responses in light of establish-

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17. See 51 U.S.L.W. 3220 (Oct. 5, 1982); see also 676 F.2d at 1201.

18. This Note will not address the policy questions surrounding tuition tax relief, such as the relative wealth of the beneficiary class, the effect of the tax relief on the public school system, the tendency of the aid to encourage "segregation academies," and the relative budgetary expense of such a measure. Discussion of these and many other issues appears in House Hearings, supra note 1; Tuition Tax Relief Bills: Hearings Before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance, 95th Cong., 2d Sess. (1978) [hereinafter cited as Senate Hearings].

19. The Supreme Court has allowed much more assistance to sectarian institutions of higher learning than to elementary and secondary sectarian schools. Hunter, supra note 7, at 547. See, e.g., Roeper v. Board of Pub. Works, 426 U.S. 736, 767 (1976) (upholding direct grants, usable for any nonsectarian purpose, to four church-affiliated colleges); Hunt v. McNair, 413 U.S. 734, 743-45 (1973) (upholding South Carolina statute authorizing issuance of revenue bonds to help religious college finance reconstruction costs); Tilton v. Richardson, 403 U.S. 672, 688-89 (1971) (upholding construction grant to four church-affiliated colleges in Connecticut, but requiring a permanent ban on religious use of the facilities). In distinguishing between aid to sectarian higher education and elementary and secondary education, the Court has reasoned that older students are less susceptible to religious influence and that institutions of higher education are not as pervaded with religion as elementary and secondary parochial schools. Tilton, 403 U.S. at 685-86. Several commentators have attacked the empirical basis of the Court's distinction. See, e.g., 124 Cong. Rec. 25,809 (1978) (statement of Sen. Moynihan) (questioning whether high school seniors are less impressionable than college freshmen); Fink, The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values, 27 Cath. U. L. Rev. 207, 237-40 (1978). Regardless of the accuracy of the Court's assumptions, the Court is likely to maintain its distinction between aid to sectarian higher education and aid to sectarian elementary and secondary education. Commentators predict that the Court would uphold the constitutionality of tuition tax credits or deductions for parents with dependents attending sectarian colleges or universities. See, e.g., Hunter, supra note 7, at 547. In fact, the Attorney General's office under President Carter wrote a letter to Congress stating its opinion that, while tuition tax credits for sectarian elementary and secondary education were unconstitutional, similar credits for higher education were constitutionally proper. See 124 Cong. Rec. 26,052-53 (1978) (memorandum from Attorney General's office).
I. ESTABLISHMENT CLAUSE DOCTRINE AND STATE AID TO RELIGIOUS EDUCATION

State aid to religious education was once widespread in the United States, and controversies over public assistance to sectarian schools have erupted periodically at both the state and federal levels since colonial times. Nevertheless, the establishment clause provided few challenges to state and federal legislation before World War II. In fact, the Court declined to

20. When the first amendment was adopted, nine of the thirteen states had established churches. 124 Cong. Rec. 25,662 (1978) (statement of Sen. Moynihan). Between 1770 and 1820, virtually all American schools were private, religiously affiliated, and publicly supported. Id. at 25,631 (statement of Sen. Packwood, quoting from memorandum prepared by Peter B. Sheridan, Library of Congress). See also R. Morgan, The Supreme Court and Religion 48 (1972) (before 1830, the only education available in America was private education). The concept of massive state aid to education, or state provision of free public education through "common" schools, however, was unknown in this country until the public school movement of the 1830's and 1840's arose under the leadership of figures like Horace Mann. Gabriel, Horace Mann: Report of the Massachusetts Board of Education 1848, in An American Primer 360-61 (D. Boorstin ed. 1966).

21. For example, an early Virginia controversy over taxation to support Christian teachers provoked a strong response from James Madison, whose "Remonstrance" has been widely cited in Supreme Court decisions. See, e.g., Everson v. Board of Educ., 330 U.S. 1, 33-44 (1947) (Rutledge, J., dissenting). Another controversy ensued in the second half of the nineteenth century, when President Grant proposed a constitutional amendment forbidding public aid to sectarian schools. See 124 Cong. Rec. 26,057 (1978) (reprinting Sen. Moynihan's commencement address at LeMoyne College in New York). Another famous case arising out of opposition to aid to religious education, and, indeed, the very existence of religious education, concerned the Oregon law requiring all pupils to attend public schools, which was ruled unconstitutional in Pierce v. Society of Sisters, 268 U.S. 510 (1925). This law was adopted after a referendum campaign organized by the Ku Klux Klan and Scottish Rite Masons. D. Kirp & M. Yudof, Educational Policy and the Law: Cases and Materials 5 (1974). See also 124 Cong. Rec. 25,805 (1978) (statement of Sen. Moynihan). The Supreme Court invalidated the law on substantive due process grounds. 268 U.S. at 534-35. For a general discussion of the nineteenth century struggle in New York State over public support of sectarian schools, see J. Pratt, Religion, Politics, and Diversity 195-203 (1987).

22. A brief discussion of the Supreme Court religion clause cases before World War II appears in Morgan, supra note 1, at 58. Although the Court occasionally dealt with religious issues before Everson v. Board of Educ., 330 U.S. 1 (1947), it never squarely faced the establishment clause question. In Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930), the Court upheld public expenditures to purchase school books and distribute them to all school children, reasoning that the legislation aided the common interest, and did not benefit only private schools or their students. In Quick Bear v. Leupp, 210 U.S. 50, 81
apply the establishment clause to any state legislation until *Everson v. Board of Education*\(^23\) in 1947. In a 5-4 decision, the *Everson* Court upheld a New Jersey statute authorizing local school districts to provide transportation to nonpublic as well as public school pupils.\(^{24}\)

The sharp division in *Everson* foreshadowed the Court's inability to forge a consensus in subsequent school aid cases.\(^{25}\) By its own admission, the Court's articulation of establishment clause doctrine in this area has lacked clarity and predictabil-

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\(^{23}\) 330 U.S. 1 (1947).

\(^{24}\) *Id.* at 3. The plaintiff in *Everson* specifically challenged a school board resolution authorizing reimbursement for money spent by parents to send their children to public schools and Catholic schools on public buses. *Id.* at 20 (Jackson, J., dissenting).

\(^{25}\) In school aid cases, the Court has divided into three groups. "Accommodationists" would accommodate the legislature's will to aid parochial schools. Justices in this group include White, Rehnquist, and, to a lesser degree, Burger. G. GUNTER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1568 (10th ed. 1980). "Separationists" would maintain strict separation between church and state. Justices in this group include Stevens, Brennan, Marshall, and, formerly, Douglas. *Id.* The "swing voters" weigh the facts of each case. Justices in this group have included Powell, Blackmun, and Stewart. *Id.* Justice O'Connor's predilections have yet to emerge.

One decision actually resulted in a 3-3-3 alignment, as various combinations of justices voted to uphold the textbook loan provision of a challenged statute, but voted to strike down two other provisions which would have permitted the provision of instructional materials such as projectors and maps, and auxiliary services. *See Meek v. Pittenger*, 421 U.S. 349, 359-62, 362-66, 367-72 (1975). The Court's syllabus of the decision illustrates the division:

Stewart, J., announced the judgment of the Court and delivered an opinion of the Court, in which Blackmun and Powell, JJ., joined, and in all but Part III of which Douglas, Brennan, and Marshall, JJ., joined . . . Brennan, J., filed an opinion concurring in part and dissenting in part, in which Douglas and Marshall, JJ., joined . . . Burger, C.J., filed an opinion concurring in the judgment in part and dissenting in part . . . Rehnquist, J., filed an opinion concurring in the judgment in part and dissent in part, in which White, J., joined.

*Id.* at 350.
ity.\textsuperscript{26} For example, according to the Supreme Court, a state may furnish bus service for children attending a sectarian school;\textsuperscript{27} however, it may not furnish bus transportation for those children to go on a field trip.\textsuperscript{28} A state may reimburse a private school for the cost of maintaining state-mandated attendance records,\textsuperscript{29} but may not reimburse such a school for the cost of grading state-mandated, teacher-prepared tests.\textsuperscript{30} A state may provide secular textbooks for the use of children attending sectarian private schools;\textsuperscript{31} yet it may not provide the same children with "instructional materials," such as projectors.\textsuperscript{32}

A. THE CURRENT THREE PART TEST

Notwithstanding this unpredictability, the Court has developed and consistently professed to apply a three pronged test to determine the constitutionality of school aid programs.\textsuperscript{33} To withstand constitutional scrutiny, the challenged statute must have a valid secular legislative purpose, must have a primary effect which neither advances nor inhibits religion, and must not foster excessive entanglement with religion.\textsuperscript{34}

\textsuperscript{26} The Court's consistent divisions were acknowledged by Justice White in the most recent elementary and secondary school aid case:

\begin{quote}
But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country . . . . 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 . . . produces a single, more encompassing construction of the Establishment Clause.
\end{quote}


\textsuperscript{27} Everson, 330 U.S. at 17.


\textsuperscript{29} Regan, 444 U.S. at 657.


\textsuperscript{32} Meek v. Pittenger, 421 U.S. 349, 362-56 (1975). "The Court has not yet spoken with respect to maps in a textbook." House Hearings, supra note 1, at 48 (statement of Professor Antonin Scalia, Stanford Law School) (Professor Scalia was recently appointed to the District of Columbia Circuit Court of Appeals).


\textsuperscript{34} Lemon v. Kurtzman, 403 U.S. at 612-13. The first two elements of this test, purpose and primary effect, first appeared in Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963), a case involving state-required prayers in public schools. The first application of the Schempp test in the context of aid to sectarian schools came five years later in Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968), where the court upheld a New York law authorizing local
1. Secular Purpose

The secular purpose test focuses on the stated legislative purpose of the challenged statute. Requiring a secular purpose helps to ensure that no taxpayer is compelled to support a church or religion through the state's sponsorship or financial support of, or active involvement in, religion. This requirement is virtually always satisfied in school aid cases because state assistance to private schools "has the obvious legitimate secular purpose of promoting educational opportunity."

2. Primary Effect

To pass the primary effect test, the challenged statute must have a primary effect that neither advances nor inhibits religion. When applied to the school aid cases, the primary effect test prohibits state aid that subsidizes the religious mission of sectarian schools. The Court will permit "neutral, nonideological" aid, such as police and fire protection, that serves a school's secular function, even though the aid indirectly benefits the school's religious mission by allowing the school to use its budget to fund religious activities rather than secular ones. The Court has unanimously invalidated aid, however, when the state lacked effective means of ensuring that the aid would fund only secular services. In applying this "effective means" standard, the Court has rejected the position that if the amount of aid does not exceed the school's cost for secular educational services, the state has successfully ensured that the aid will not serve the school's religious mission. In addition to providing a criterion for assessing primary effect, the "effective means" educational agencies to loan textbooks to nonpublic schoolchildren. The excessive entanglement test first appeared in Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970).

35. *Nyquist*, 413 U.S. at 773.
36. *Id.* at 772.
37. *See, e.g.*, *id.* at 773 ("[W]e need touch only briefly on the requirement of a 'secular legislative purpose.' As the recitation of legislative purpose appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests."); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) ("[T]he statutes themselves clearly state that they are intended to enhance the quality of the secular education.").
41. *Id.* at 775.
42. *See Regan*, 444 U.S. at 659; *Nyquist*, 413 U.S. at 774-80.
43. *See Nyquist*, 414 U.S. at 787.
standard connects the primary effect and excessive entanglement prongs of the three part test. Aid which satisfies the primary effect test may be excessively entangling if ensuring that the aid serves purely secular purposes would require "continuing state surveillance."44

When applying the primary effect test, the Court has not distinguished between direct aid to nonpublic schools and aid to nonpublic school children, their parents, or service providers. The Court generally has held that the direct beneficiary of the aid is unimportant if the ultimate effect of the aid is to provide financial support for sectarian institutions or activities.45 Consequently, the Court will invalidate aid that does not directly benefit church schools if it finds that the aid rewards parents for sending their children to such schools.46 On the other hand, the Court has upheld direct state cash payments to church schools if there are effective means, such as auditing procedures, to ensure that the grants will be used only for secular services.47 The constitutionality of state aid, therefore, depends not upon whether church schools are the direct recipients of the aid, but upon whether the state retains effective means to ensure that only the secular functions of those schools are benefited.

3. Excessive Entanglement

For a statute to satisfy the excessive entanglement test, the state must be able to ensure the secular use of the aid without creating enduring and entangling contacts between state and church.48 The Court has recognized two types of excessive entanglement: administrative and political. Administrative entanglement results from "comprehensive, discriminating, and continuing state surveillance"49 of religious affairs to ensure that the contemplated aid remains strictly secular in nature.50 Political entanglement results from repeated confrontation

44. Lemon v. Kurtzman, 403 U.S. at 619. See also infra notes 48-56 and accompanying text.
45. See, e.g., Nyquist, 413 U.S. at 783.
46. Id. at 791.
47. Regan, 444 U.S. at 659.
48. See, e.g., Meek, 421 U.S. at 372.
49. Lemon v. Kurtzman, 403 U.S. at 619.
50. Examples include monitoring auxiliary services personnel to ensure religious neutrality while working on nonpublic school grounds, Meek, 421 U.S. at 372; monitoring teachers to ensure their religious neutrality in the classroom, Lemon, 403 U.S. at 619; and tax valuation, tax liens, and tax foreclosure arising from taxation of church property, Walz, 397 U.S. at 674.
among sects competing for public funds in the political arena.\textsuperscript{51} The excessive entanglement test guards against the latent dangers of government hostility toward religion\textsuperscript{52} that arise when government expands its involvement with religion.\textsuperscript{53}

Under this test, a state may not provide aid if officials would have to monitor nonpublic school personnel closely to ensure secular use of the aid.\textsuperscript{54} Nevertheless, the Court recently held in Committee for Public Education and Religious Liberty v. Regan that state auditing of church school expense accounts to verify the school's cost of rendering reimbursable services does not constitute excessive entanglement.\textsuperscript{55} Justice White, writing for the majority, reasoned that the reimbursable services, test scoring and attendance taking, were "discrete and clearly identifiable" and that the reimbursement process was "straightforward and susceptible to the routinization that characterizes most reimbursement schemes."\textsuperscript{56} Thus, the Court apparently will tolerate some degree of continuing state involvement with church schools, as long as the involvement

\textsuperscript{51} Examples include the recurrent nature of the appropriations process for renewal of an auxiliary services program, \textit{Meek}, 412 U.S. at 372; the self-perpetuating tendencies of tuition grant and credit programs and maintenance and repair provisions, \textit{Nyquist}, 413 U.S. at 797; and the recurrent nature of continuing annual appropriations for, and likely demand for expansion of, teacher salary supplements, \textit{Lemon}, 403 U.S. at 623. For a criticism of the "political entanglement" theory, see Gaffney, \textit{Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy}, 24 St. L. U. L. J. 205, 206 (1980) ("political divisiveness" test entails unacceptable consequences for civil liberties).

\textsuperscript{52} \textit{See Walz}, 397 U.S. at 673.

\textsuperscript{53} \textit{See id.} at 674. Aid programs invalidated under the excessive entanglements test include "auxiliary services" conducted on nonpublic school premises including guidance, counseling, and testing services, psychological services, services for exceptional children, and services for educationally disadvantaged children, \textit{Meek}, 421 U.S. at 367-72; and direct payments to nonpublic school teachers in amounts up to 15% of total salary for educational services rendered, \textit{Lemon}, 403 U.S. 602, 619 (1971).

\textsuperscript{54} \textit{Wolman v. Walter}, 433 U.S. at 254 (invalidating provision of Ohio law allowing public funds to be used for transporting sectarian school students on field trips under supervision of nonpublic school teachers). The Court's action in upholding state loans of textbooks to nonpublic school children in \textit{Board of Educ. v. Allen}, 392 U.S. 236 (1968), suggested that a state may provide aid to schools if the state can determine that the aid is secular in nature through one inspection before the aid is distributed. \textit{See id.} at 254-55. Subsequently, however, the Court invalidated state loans of periodicals, maps, charts, and films to nonpublic schools or to nonpublic school children, \textit{Meek v. Pittenger}, 421 U.S. at 354-55, even though the Court acknowledged that such materials were "secular, nonideological and neutral." \textit{Id.} at 365. The Court has thus explicitly declined to extend \textit{Allen} to items other than textbooks. \textit{See Wolman}, 433 U.S. at 252 n.18; \textit{infra} notes 65-72 and accompanying text.

\textsuperscript{55} \textit{Regan}, 444 U.S. at 659-60.

\textsuperscript{56} \textit{Id.} at 660.
does not require state inspection and evaluation of the religious content of particular educational services.

B. TEXTBOOKS AND INSTRUCTIONAL MATERIALS

An analysis of the conflict between the First Circuit's ruling in *Norberg*\(^57\) and that of the Eighth Circuit in *Mueller*\(^58\) requires familiarity with several leading Supreme Court cases, as well as with the Court's three pronged mode of analysis discussed above.\(^59\) *Board of Education v. Allen*\(^60\) provides the most important precedent regarding the textbook deduction provision of the challenged statutory schemes.\(^61\) In *Allen*, the Court upheld a New York law authorizing local educational agencies to loan textbooks to nonpublic school children.\(^62\) Justice White, writing for the majority, reasoned that the textbooks, prescreened by public school authorities, were secular in nature,\(^63\) and rejected the argument that church schools are so pervaded by religion that any aid to their educational function necessarily aids their religious mission.\(^64\)

Although *Allen* announced the principle that the nature and effect of state aid will be presumed to be neutral unless those challenging the aid can show otherwise,\(^65\) the Court subsequently has declined to extend this presumption of neutrality to items other than textbooks.\(^66\) In *Meek v. Pittenger*,\(^67\) the Court invalidated loans of "instructional materials" to nonpublic schools.\(^68\) Reversing the logic of *Allen*, the Court reasoned that the program benefited church schools that provided an integrated secular and religious education.\(^69\) Consequently, the "massive" loans of materials would inevitably help those schools advance their religious missions.\(^70\) The Court subse-

\(^{57}\) 630 F.2d 855 (1st Cir. 1980).

\(^{58}\) 676 F.2d 1195 (8th Cir. 1982), cert. granted, 51 U.S.L.W. 3220 (Oct. 5, 1982).

\(^{59}\) See supra notes 33-56 and accompanying text.

\(^{60}\) 392 U.S. 236 (1968).

\(^{61}\) See supra note 10 for the statutory language authorizing the textbook deduction provision.

\(^{62}\) 392 U.S. at 243-44.

\(^{63}\) Id. at 244-45.

\(^{64}\) Id. at 245.

\(^{65}\) See id. at 248. See also Wolman v. Walter, 433 U.S. at 252 n.18.

\(^{66}\) Wolman, 433 U.S. at 252 n.18.

\(^{67}\) 421 U.S. 349 (1975).

\(^{68}\) These materials could include periodicals, photographs, maps, charts, sound recordings, films, projection equipment, recording equipment, and laboratory equipment. Id. at 354-55.

\(^{69}\) Id. at 366.

\(^{70}\) Id.
quently invalidated an Ohio statute authorizing state loans of instructional materials to pupils on the ground that those materials would have the same effect as items provided directly to the school.71 In a footnote, the Court noted the “tension” between its holding and the result in *Allen* and explicitly declined to extend *Allen* to items other than textbooks.72

C. **Tax Benefits and Religious Institutions**

The two cases most relevant to the tuition deduction provision challenged in *Norberg* and *Mueller*73 are *Walz v. Tax Commission*74 and *Committee for Public Education and Religious Liberty v. Nyquist,*75 both of which addressed the constitutionality of tax relief which aided religious institutions. In *Walz,* the Supreme Court upheld the constitutionality of the New York City Tax Commission’s grant of a property tax exemption to religious organizations for property used solely for religious worship.76 The Court conceded that granting tax exemptions afforded churches an indirect economic benefit and gave rise to some state involvement in church affairs.77 The benefit did not amount to sponsorship, however, because the government did not transfer funds to churches, but merely abstained from taxing them, just as it abstained from taxing libraries, art galleries, and hospitals.78 Moreover, the state involvement caused by tax exemption was “minimal and remote,”79 while taxation of churches would give rise to greater entanglement in the form of “tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.”80 These considerations, coupled with the longstanding and widespread historical acceptance of tax exemptions for churches,81 convinced the Court that federal or state grants of tax exemption to churches do not violate the establishment clause.82

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72. *Id.* at 252 n.18.
73. See *supra* note 10 for the statutory language authorizing the tuition deduction provision.
75. 413 U.S. 756 (1973).
76. 397 U.S. at 666-67.
77. *Id.* at 674-75.
78. *Id.* at 675.
79. *Id.* at 676.
80. *Id.* at 674.
81. *Id.* at 676-78.
82. *Id.* at 680.
The Nyquist decision invalidated a New York law which provided parents of nonpublic school children with a tuition reimbursement if their income was less than $5000,83 or with a tuition deduction if their income exceeded that amount.84 The Court held that both provisions violated the primary effect test.85 The ultimate effect of the tuition reimbursement was "unmistakably to provide financial support for nonpublic sectarian institutions," because it provided a financial incentive for parents to send their children to sectarian schools86 and ensured their financial ability to do so.87 The Court also struck down the tax deduction,88 reasoning that it too rewarded parents for sending their children to nonpublic schools.89 The Court noted that the deduction was like a tax credit, since it yielded a fixed amount of "tax forgiveness" in exchange for performing an act which the state desired to encourage.90 The Court therefore reserved decision on the constitutionality of a "genuine tax deduction."91

83. 413 U.S. at 764-65.
84. Id. at 765-66.
85. Id. at 783, 789-94.
86. Id. at 786.
87. Id. at 783.
88. Id. at 789-94.
89. Id. at 791.
90. Id. at 789. Under the state tax deduction provision, parents could subtract from their adjusted gross income a designated amount for each dependent for whom they had paid at least $50 in nonpublic school tuition. The designated amount decreased as the taxpayer's income increased. Id. at 785.
91. Id. at 790 n.49. This footnote has become important in the litigation arising out of the Minnesota and Rhode Island textbook and tuition deduction statutes. The Eighth Circuit distinguished the Minnesota and Rhode Island schemes from Nyquist on the ground that the Minnesota provision operates as a "true tax deduction." 676 F.2d at 1203. Several Supreme Court decisions since Nyquist, however, suggest that the distinction between tax credits and "genuine" deductions does not have the constitutional weight Nyquist suggested. The Supreme Court has summarily affirmed and denied certiorari to lower court decisions invalidating state income tax credits for parents of children in kindergarten, elementary, and secondary nonpublic schools. See Franchise Tax Bd. v. United Americans for Pub. Schools, 419 U.S. 890 (1974) (summarily affirming unreported decision by a California district court); Minnesota Civil Liberties Union v. State, 302 Minn. 216, 233, 224 N.W.2d 344, 353 (1974), cert. denied, 421 U.S. 988 (1975). The Supreme Court also summarily affirmed a decision by an Ohio district court invalidating an Ohio state tax credit for nonpublic school parents that provided a dollar-for-dollar offset of the taxpayer's liability under state income and property taxes, up to $90 per pupil. See Kosydar v. Wolman, 353 F. Supp. 744, 756 (S.D. Ohio 1972), aff'd sub nom. Grit v. Wolman, 413 U.S. 901 (1973). Finally, the Court has summarily affirmed a Third Circuit decision invalidating a New Jersey tuition tax deduction which operated as a $1000 tax exemption for each dependent child attending on a full time basis an elementary or secondary institution not deriving its primary support from public moneys. See Public Funds for Pub. Schools v. Byrne, 590 F.2d 514,
The Nyquist majority distinguished the property tax exemption for religious property upheld in Walz. While property tax exemptions like the one in Walz had enjoyed longstanding and widespread historical acceptance, the New York tax benefits were comparatively recent. More important, the Court maintained that the exemptions helped guard religions from state hostility and thus fostered governmental neutrality toward religion, while the tax credits would have increased governmental involvement in religion and might have adversely affected neutrality. Finally, the beneficiary class of charitable institutions in Walz was broader and included more secular interests than the beneficiary class of nonpublic school parents in Nyquist, thus reducing the chance that the governmental aid in Walz would provoke political strife along sectarian lines.

II. THE NORBERG AND MUELLER DECISIONS

Given the lack of clarity and predictability in the Court's approach to school aid cases and the persistent efforts of state legislatures to find new ways to channel aid to nonpublic schools, the direct conflict between the First and Eighth Circuits concerning the constitutionality of the Rhode Island and Minnesota tuition tax deduction schemes is not surprising. This Part describes how the Norberg and Mueller courts reasoned from Supreme Court precedents to reach opposite conclusions concerning the validity of virtually identical statutes.

516 (3d Cir.), aff'd mem., 442 U.S. 907 (1979). For a detailed discussion of the effect of these decisions on the "true tax deduction" issue, see infra notes 152-53 and accompanying text.

92. Nyquist, 413 U.S. at 792-94.
93. Id. at 792.
94. Id. at 793.
95. See supra note 2.
96. Norberg, 630 F.2d at 862; Mueller, 676 F.2d at 1201. The Mueller court, observing that "no one seriously challenges the transportation deduction," noted that Everson v. Board of Educ., 330 U.S. 1 (1947), approved financed transportation to and from all schools, including sectarian schools. 676 F.2d at 1201. The Eighth Circuit reasoned that an indirect tax deduction for all Minnesota parents must also be permissible. Id. at 1201. As in Everson, the court noted, the financial benefits flowing from the Minnesota statute were directed to all parents in the community. Id.
97. See supra note 2.
98. Neither the First nor the Eighth Circuit held that the transportation deduction provision failed to satisfy the Supreme Court's three pronged test. See Norberg, 630 F.2d at 862; Mueller, 676 F.2d at 1201. The Mueller court, observing that "no one seriously challenges the transportation deduction," noted that Everson v. Board of Educ., 330 U.S. 1 (1947), approved financed transportation to and from all schools, including sectarian schools. 676 F.2d at 1201. The Eighth Circuit reasoned that an indirect tax deduction for all Minnesota parents must also be permissible. Id. at 1201. As in Everson, the court noted, the financial benefits flowing from the Minnesota statute were directed to all parents in the community. Id.
A. THE TEXTBOOK AND INSTRUCTIONAL MATERIALS DEDUCTION

The First Circuit invalidated the textbook and instructional materials deduction under the excessive entanglement test. The court approved the district court's reasoning that, because the statute allowed parents to decide for themselves which books and materials were secular and therefore eligible for the deduction, only continuing state surveillance could ensure that parents did not receive deductions for religiously oriented books and materials. Since schools rather than parents usually choose curriculum materials, any dispute over the religious nature of those materials eventually would have to be resolved between the state and the religious institutions. The court therefore concluded that surveillance of parents' claimed deductions would ultimately result in excessive entanglement between the state and religious institutions.

The court rejected the state's argument that instructional materials that originally are secular will not change in use, noting that an existing Rhode Island statute required local school committees to lend secular textbooks to all Rhode Island children. The court found that the prior existence of

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99. 630 F.2d at 861-62.
100. Id. at 862.
101. Id.
102. Id.
103. Id. The Supreme Court's decisions in Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), had expressly forbidden loans of materials and equipment such as film projectors and teaching aids because of the potential administrative entanglement involved in ensuring that the materials were not used to promote the school's religious mission. See supra notes 65-72 and accompanying text.
104. 630 F.2d at 862.
this statute gave the new deduction "a sectarian hue,"105 implying that because the government already provided secular textbooks to private schools free of charge, the only books the parents would claim deductions for would be sectarian. The court did not, however, explain the relationship between the pre-existing Rhode Island textbook loan statute and the proposed deduction for instructional materials.106

The Eighth Circuit, on the other hand, upheld the textbook and instructional materials deduction provision. Apparently addressing the primary effect issue, the court concluded that the textbook deduction fell within the constitutional protection of Board of Education v. Allen,107 which had upheld state provision of textbooks to nonpublic school children.108 With regard to instructional materials, the Eighth Circuit acknowledged that previous Supreme Court cases had invalidated loans of instructional materials and equipment directly to sectarian schools,109 but distinguished those cases on the ground that the Minnesota law directed its benefits to the parent and student, not to the school.110 The nature of the beneficiary was a constitutionally significant factor;111 the court noted, because instructional equipment needed by a school would often be equally useful for both secular and religious training, whereas items such as rulers and tennis shoes, which a student would be likely to purchase, would not.112

Relying on the district court's reasoning, the Eighth Circuit also held that the textbook and instructional materials deductions satisfied the excessive entanglement test.113 The district court had acknowledged that some textbook and materials deductions might require examination.114 Nevertheless, the lower court had held that the entanglement would be "minimal," noting that the primary method of surveillance would be an individual audit.115

105. Id.
106. See id.
108. 676 F.2d at 1201.
109. Id.
110. Id. at 1201-02.
111. Id. at 1202.
112. Id.
113. Id.
114. 514 F. Supp. at 1003.
115. Id. The district court had previously upheld the textbook deduction in Roemer. 452 F. Supp. at 1319. The court reasoned that since the Supreme Court had previously permitted states to provide textbooks directly to parochial schools and students, see Board of Educ. v. Allen, 392 U.S. 236, 248 (1968),
B. THE TUITION DEDUCTION

The First Circuit held that the tuition deduction violated the primary effect test. The court noted that neither the form of the aid nor the nature of the beneficiaries was constitutionally significant. Citing *Nyquist*, the court reasoned that if an indirect subsidy for textbooks would be valid a fortiori. 452 F. Supp. at 1318-19.

116. 630 F.2d at 858-61. In *Roemer*, the Minnesota Federal District Court's opinion was primarily devoted to analysis of the tuition deduction provision under the primary effect test. See 452 F. Supp. at 1319-22. The court acknowledged that the statute was facially neutral toward religion, but stated that further inquiry was necessary to determine whether the tuition deduction primarily advanced the religious function of affected parochial schools. *Id.* at 1320. Because the court could find "no discernible consistency" in Supreme Court doctrinal analysis, the court concentrated on "the two most relevant cases," *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), and Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973). *Id.* These cases were relevant, the court reasoned, because they were the only two Supreme Court decisions addressing the establishment clause ramifications of tax benefits to religious organizations. *Id.*

The court listed three factors which distinguished the permissible tax exemption in *Walz* from the impermissible tax deduction in *Nyquist*: the degree to which the tax benefit aided the sectarian institution; the breadth of the class benefiting from the tax relief; and the historical acceptance of the tax benefit to religious activity. *Id.* The court concluded that all three factors favored distinguishing the questioned Minnesota law from the New York statute invalidated in *Nyquist*.

First, the court found that the Minnesota law functioned as a "true tax deduction," and that *Nyquist* had expressly reserved decision on the constitutionality of a true tax deduction. *Id.* at 1321. *See supra* notes 91-95 and accompanying text. The court envisioned a "spectrum" of "directness" of aid to religious institutions. Aid in the form of subsidies and grants was "direct" and therefore impermissible, but aid in the form of exemptions was "remote" and therefore permissible. 452 F. Supp. at 1321-22. A "true tax deduction" lay somewhere between these two extremes. *Id.* The court reasoned that the Minnesota statutory scheme reduced the tax base rather than directly reducing the amount of tax due. *Id.* Parents with children attending parochial schools would benefit only if the deduction caused them to be in a lower bracket. *Id.* The resultant relationship between tax benefit and religious activity was much more remote than the tax credit system previously invalidated by the Supreme Court. *Id.* at 1321-22.

The court then noted that the class of beneficiaries under the questioned statute was wider than that involved in *Nyquist*, for the Minnesota law extended its benefits to parents of public elementary or secondary school students with dependents attending nonpublic schools. *Id.* at 1322. The court also maintained that since the law had been unchallenged since its enactment in 1955, the historical acceptance of the tax benefit militated in favor of its continuation. *Id.* The court likened the law to the widely accepted tax deduction for contributions to charitable institutions, including religious organizations. *Id.* Besides its historical acceptance, the tuition deduction, like the exemption allowed in *Walz*, supported the valid legislative goal of avoiding hostility to religion through taxation. *Id.* Because of the lack of direct benefit to religious activity, the breadth of the beneficiary, and the historical acceptance of the tax deduction, the court concluded that the Minnesota law did not have the primary effect of advancing religion. *Id.*
the deductions conferred a special benefit on parents who sent their children to religious schools, the statute violated the establishment clause because it rewarded performance of a religious act.\textsuperscript{117} Whether the religious schools received any direct benefit as a result of the tax relief was irrelevant.\textsuperscript{118} The court also noted that a variety of tax credits and deductions for parents of parochial school children have been invalidated on establishment clause grounds.\textsuperscript{119} Consequently, the court reasoned, aid to religious education in the form of tax benefits to parents is not constitutionally superior to direct grants.\textsuperscript{120}

The First Circuit concluded that the factor controlling the constitutionality of tax aid to religious institutions and religious education was the breadth of the benefited class.\textsuperscript{121} In support of its conclusion, the court noted that such tax relief has been upheld only when the affected religious organizations were part of a broader class of beneficiaries.\textsuperscript{122} The district court had found that the vast majority of parents eligible for the tax deduction sent their children to sectarian schools.\textsuperscript{123} Because the Rhode Island income tax is based on a percentage of the taxpayer's federal income tax, any parent eligible for the deduction who also owed federal tax would benefit.\textsuperscript{124} Since most parents are likely to pay federal income tax, the First Circuit concluded that the statute conferred a benefit "along nearly solid sectarian lines."\textsuperscript{125} Consequently, the court distinguished the Rhode Island tax benefits scheme from the broad class of beneficiaries upheld in Walz and invalidated the statute under Nyquist.

In contrast, the Eighth Circuit upheld the tuition deduction under the primary effect test, distinguishing the New York law invalidated in Nyquist on two grounds. First, the Minnesota scheme, unlike the law in Nyquist, provided a "true" deduction.\textsuperscript{126} Because the tax benefit in Nyquist was not related to the amount actually spent on tuition, it operated as a tax credit

\begin{itemize}
  \item[117.] 630 F.2d at 858.
  \item[118.] Id.
  \item[119.] Id. at 860-61. See also supra note 91.
  \item[120.] 630 F.2d at 860.
  \item[121.] Id. at 861.
  \item[122.] Id. See, e.g., Walz, 397 U.S. at 673. See also supra text accompanying notes 76-82.
  \item[123.] 630 F.2d at 859-60 (quoting Norberg, 479 F. Supp. at 1366).
  \item[124.] 630 F.2d at 860.
  \item[125.] Id.
  \item[126.] Mueller, 676 F.2d at 1203. See supra notes 88-91 and accompanying text.
\end{itemize}
rather than a deduction,127 and the Nyquist Court had specifically declined to decide whether a "genuine tax deduction" would be constitutional.128 The Minnesota deduction, however, varied with the tuition paid. Moreover, the deduction yielded no tax benefit unless it was large enough to move the taxpayer into a lower bracket.129 The court concluded that the Minnesota tax benefit to the school was "more diffused and less certain" than the aid in Nyquist,130 but did not clarify whether this difference alone would dispose of the primary effect issue.

The Eighth Circuit also distinguished Nyquist on the basis of the breadth of the benefited class. The New York law limited tax benefits to parents of private school children, but the Minnesota scheme covered tuition paying parents with dependents in public or private schools.131 Although this distinction appears to depend on a facial, or "de jure," analysis of the breadth of the benefited class, the court explicitly rejected both a strict de jure and a pure de facto approach.132 While the

127. 676 F.2d at 1203.
128. Id. See Nyquist, 413 U.S. at 790 n.49. See also supra note 91 and accompanying text.
129. 676 F.2d at 1197. The court's language follows the conclusion of the district court: "The deductions are subtracted from gross income and thus reduce the tax base. They result in a tax benefit only if the deduction moves the taxpayer into a lower bracket." Mueller v. Allen, 514 F. Supp. 998, 1000 (D. Minn. 1981). This statement, however, is imprecise. Minnesota "gross income" consists of federal adjusted gross income, with various modifications increasing or decreasing that amount. See Minn. Stat. § 290.01(20) (1982). The contested provision allows a deduction from "gross income." See Minn. Stat. § 290.09 (22) (1982). This deduction thus affords a tax benefit to any parent meeting the requirements of subdivision 22. See supra note 10. The court's conclusion that the deduction yields no tax benefit unless it moves the taxpayer into a lower bracket apparently refers to the Minnesota standard deduction. See Minn. Stat. § 290.09(15) (1982). This provision allows the taxpayer to deduct an amount equal to 10% of adjusted gross income, up to a maximum deduction of $2,000, in lieu of the tuition deduction and other deductions under Minn. Stat. § 290.09. Hence, an individual taxpayer probably would not claim the tuition deduction unless the amount of the deduction, together with the taxpayer's other allowable deductions from gross income, exceeded the taxpayer's standard deduction under Minn. Stat. § 290.09(15).
130. 676 F.2d at 1197.
131. Id. at 1203.
132. Id. at 1201 n.13.

If a strict de jure analysis were advocated, one would be inviting legislatures to enact facially neutral statutes which could operate as mere sham. If a pure de facto approach were taken, a statute's constitutionality might turn on local annual statistics. That is, the same statute might be constitutional one year, and not the next, or in one state and not in another, depending upon the current statistical breakdown of sectarian and nonsectarian schools. Nothing so rigid or so arbitrary can be gleaned from precedent in this area.

Id.
court never explained what approach it adopted, *Mueller* can plausibly be read to stand for the proposition that a court must weigh the degree of arbitrariness of the tax benefit, the breadth of the de jure class, and the breadth of the de facto class in applying the primary effect test to tax benefit cases. The less arbitrary the tax benefits and the more general the de jure class, the narrower the de facto class can be without invalidating the statute. This reading is supported by the court's reaction to statistics. The court found that fourteen to eighteen percent of the eligible taxpayers were parents of nonsectarian private school children and that public school parents would qualify collectively for over two million dollars in deductions.133 Emphazising the breadth of the de jure class, the court concluded that the de facto class was sufficiently broad for the statute to stand.134

III. ANALYSIS OF THE COURTS' APPROACHES

The *Norberg* and *Mueller* decisions present three basic issues: whether the tax deduction for books and instructional materials violates the excessive entanglement test; whether the tuition deduction functions as a "true tax deduction" and if so, whether it is constitutional; and whether broadening the beneficiary class to include public school parents as well as nonpublic school parents renders the challenged statutory scheme constitutional.

A. EXCESSIVE ENTANGLEMENT AND THE DEDUCTION FOR TEXTBOOKS AND INSTRUCTIONAL MATERIALS

The First Circuit correctly concluded that the statutory deduction for textbooks and instructional materials violated the establishment clause of the first amendment. Enforcement of

133. *Id.* at 1204.
134. *Id.* at 1205. In *Roemer*, Judge Alsop dissented from the majority's disposition of the tuition deduction provision under the primary effect test. 452 F. Supp. at 1321. He reasoned that the number of taxpayers actually affected by the extension of the deduction to tuition paying public school parents was so limited as to broaden the scope "only imperceptibly" beyond previously impermissible provisions. *Id.* at 1323 (Alsop, J., dissenting). Since the Minnesota deduction provided no less of a subsidy to the sectarian activities of the school than did the statute invalidated in *Nyquist*, Judge Alsop concluded that the relationship between tax relief and taxpayers' actual expenditures was "without constitutional significance." *Id.* at 1324 (Alsop, J., dissenting). Finally, the Minnesota deduction's twenty-five year history was far too short to connote universal historical acceptance. *Id.* (Alsop, J., dissenting). Hence, Judge Alsop would have held that the statute had the impermissible primary effect of advancing religion. *Id.* (Alsop, J., dissenting).
the restriction against religiously oriented books would require continuing state surveillance, and such a monitoring system eventually would result in church-state entanglement because school administrators, not parents, devise the curriculum. Controversies would arise when private schools selected textbooks that were not clearly secular in content and private school parents subsequently claimed deductions for those textbooks. A controversy between a parent and the government regarding the secular nature of a particular book would quickly become a dispute between the state and the sectarian school administration that selected the book. State courts and administrators would have to draw increasingly fine distinctions between "secular" and "religious" subject matter. The excessive entanglement requirement exists to prevent exactly this type of controversy from arising. The Eighth Circuit completely ignored this problem, relying on the Supreme Court's approval of textbook loans to nonpublic school children in Allen. The loan programs in Allen, however, allowed the state to preselect and prescreen textbooks to ensure their secular nature, thereby obviating the need for continued surveillance. In contrast, the Rhode Island and Minnesota schemes afford the state no opportunity to prescreen textbooks.

In addition, the textbook provision might pressure private

135. "Scientific creationist" biology textbooks provide an example of a potential controversy concerning religious content of secular textbooks. Recently, a federal district court in Arkansas ruled that a state cannot require public school biology teachers to teach the "scientific creationist" theory of human development as well as "Darwinian evolution," on the ground that "scientific creationism" constitutes a religion, not a science. See McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1264-66 (E.D. Ark. 1982). This ruling, however, does not affect the rights of nonpublic school administrators and educators to choose these books in their own biology classrooms. In fact, one of the major attractions of nonpublic sectarian schools is their ability to operate without the restrictions public schools face. Given this freedom, and the strong public demand for such textbooks, evidenced by the passage of the Arkansas law invalidated in McLean, nonpublic sectarian schools will inevitably use some books to teach secular subjects which are not obviously "secular" in nature.

136. See supra note 135. One can reasonably anticipate controversies which, like McLean, force an administrative or judicial body to determine whether the subject matter and approach of a given textbook tends to promote secular education or religious training.

137. Cf. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (eschewing tax valuation of church property because of the "direct confrontations and conflicts that follow in the train of... legal processes"). See supra text accompanying notes 76-82. Under Walz, the textbook deduction provision falls because of its potential to cause excessive entanglement between church and state.

138. 676 F.2d at 1201. See also supra text accompanying notes 107-08.

139. Board of Educ. v. Allen, 392 U.S. 236, 244-45 (1968). See also supra text accompanying notes 63-64.
school administrators to choose more neutral, "secular" books than they would ordinarily select, to ensure parents' ability to qualify for deductions.\footnote{140} This subtle coercion would threaten the uniqueness and diversity private schools bring to American education,\footnote{141} the very qualities proponents of public aid to private schools wish to preserve.\footnote{142}

On the instructional materials issue, the Eighth Circuit concluded that items such as tennis shoes, purchased by a student for classroom use, present little danger of aiding religion and therefore are constitutionally distinguishable from materials such as maps and film projectors, purchased by an institution, which are equally useful in both secular and religious training.\footnote{143} If this argument were correct, the instructional materials deduction would not necessitate continuing state surveillance. The breadth of the term "instructional materials," however, undercuts the reasoning in \textit{Mueller}. The Eighth Circuit read the statute to allow deductions only for materials that could be provided to students on an individual basis, yet nothing on the face of the statute justifies this assumption.\footnote{144} For example, a sectarian school could add a "user's fee" to tuition for the use of maps, projectors, and cassette tapes. Since the parents would pay this user's fee for instructional materials, under the present statutory definition they could deduct the fee from their gross income. Through this two-step process, the state could subsidize sectarian schools' use of instructional materials, a result clearly in conflict with previous Supreme Court holdings.\footnote{145}

\footnote{140. \textit{Cf.} Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 775 (1976) (Stevens, J., dissenting) ("I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it.").}

\footnote{141. \textit{See infra} text accompanying notes 184-85.}

\footnote{142. \textit{See H.R. 12050, 95th Cong., 2d Sess., 124 Cong. Rec. 25,378 (1978) (Senate tuition tax credit bill passed by Senate, but only after amendment had removed credits for elementary and secondary school parents, leaving only credits for parents with dependents in institutions of higher education).}}

\footnote{143. 676 F.2d at 1202. \textit{See also supra} text accompanying notes 109-12.}

\footnote{144. \textit{See supra} note 10. Note that the Minnesota statute includes "instructional materials" in its definition of "textbooks," yet never defines "instructional materials." \textit{See Minn. Stat.} § 290.09(22) (1982). The statute subsequently excludes "instructional books and materials" used for the teaching of religion, and "such books and materials" for extracurricular activities. \textit{See id.} The statute, however, is silent as to whether "instructional materials" can include maps, film projectors, and cassette tapes, which the Supreme Court has previously held cannot be directly supplied to sectarian nonpublic schools, \textit{see Meek}, 421 U.S. at 362-66, or to students, \textit{see Wolman}, 433 U.S. at 252.}

\footnote{145. The instructional materials deduction may also violate the primary effect test. The Supreme Court has held that loans of instructional materials to}
B. THE "TRUE TAX DEDUCTION" TEST

In Nyquist, the Supreme Court characterized the challenged tax benefit as a cross between a tax credit and a deduction. The Court expressly reserved the question of the validity of a "genuine tax deduction" which benefited religion, such as the deduction for charitable contributions. The Court's discussion, however, did not make clear what distinguishes a tax credit from a "genuine" deduction or how important this difference is in deciding establishment clause questions.

On the one hand, the Nyquist Court emphasized the arbitrariness of the challenged tax benefit. In the course of invalidating the law under the primary effect test, the Court noted that parents of children attending nonpublic schools were able to decrease their adjusted gross income by an amount unrelated to the amount actually spent on tuition. Thus, Nyquist could be read as holding that tax benefits which are arbitrary in this way are more suspect under the primary effect test than those which are not. The Court's characterization of charitable deductions as "genuine" supports this reading of Nyquist. Charitable deductions, unlike the tax benefits invalidated in Nyquist, are based on actual expenditures. If this distinction between arbitrary tax benefits and "true" deductions is constitutionally significant, the Mueller court was correct in distinguishing the Minnesota deduction scheme, in which the tax benefit depends on the amount of tuition paid.

In contrast, the Nyquist Court's focus on the nature of the New York tax benefit as a subsidy undercuts its apparent emphasis on the distinction between arbitrary benefits and true deductions. At one point, the Court characterized tax credits as benefits designed to encourage specific acts, and it invalidated the New York law on the ground that the tax benefit it conferred was a reward for sending children to sectarian

private schools, see Meek, 421 U.S. at 362-66, and to their students, see Wolman, 433 U.S. at 250-51, violate the primary effect test. In reaching these conclusions the Court reasoned that the result did not depend on whether the state could ensure that the materials would remain ideologically neutral. Meek and Wolman could perhaps be distinguished from the Minnesota-Rhode Island scheme on the basis of the amount of indirect aid to the schools. See Meek, 421 U.S. at 365; Wolman, 433 U.S. at 233-94.

146. 413 U.S. at 789.
147. Id. at 790 n.49.
148. Id. at 789.
The property tax exemption for religious institutions upheld in *Walz* differed from a subsidy, the Court concluded, because it was designed to prevent hostility to, rather than to subsidize, religion. Because tuition tax credits reward attendance at religious schools whether they are fixed in amount or vary with actual expenditures, this reading of *Nyquist* supports the *Norberg* court's invalidation of the Rhode Island scheme.

A later Supreme Court decision and general tax theory both tend to confirm the latter interpretation of *Nyquist*. In *Grit v. Wolman*, the Court summarily affirmed the invalidation of a system of tax credits for nonpublic school parents in which the amount of credit depended on the amount of tuition paid. Although this tax benefit scheme was a credit against tax rather than a deduction from adjusted gross income, it lacked the arbitrariness the Court emphasized in *Nyquist*. *Grit* suggests that the distinction between arbitrary credits and true deductions is less important than the language in *Nyquist* might imply.

Tax policy considerations also support this conclusion. Deductions, credits, and other "special tax provisions" are designed either to measure and define net income or to subsidize and stimulate taxpayer behavior. Net income is defined by deducting from gross receipts the expenses incurred in generating those receipts. Under this analysis, tuition tax deductions for parents of children attending nonpublic schools do not serve to define net income, for tuition costs do not help parents earn their income. In fact, tuition costs at the elementary

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150. 413 U.S. at 786.
151. Id. at 793.
152. 413 U.S. 901 (1973).
157. *See* Wolman, *supra* note 155, at 539. Some arguments can be made that an executive needs to send his or her children to college as an "ordinary" business expense because the executive's "status" in the business organization depends upon his or her ability to satisfy such social expectations as sending
and secondary school level reflect parents' consumption choices, based on their academic, religious, or social preferences. These costs are personal expenses, which are generally disallowed as deductions under federal law. Hence, the tuition tax deduction scheme at issue in Norberg and Mueller, like other tuition tax relief provisions, constitutes a subsidy and not an attempt to define net income.

Under this analysis, the Mueller court should not have used the credit-deduction distinction when applying the primary effect test to the Minnesota tuition deduction. The Eighth Circuit attempted to distinguish the tax relief invalidated in Nyquist because the Minnesota scheme, unlike New York's, did not reflect a legislative attempt to assure that "each" family would receive a "carefully estimated" net benefit. The deduction provision makes no sense, however, unless the Minnesota legislature intended to provide most tuition paying parents with some net benefit. The exclusion of a few families from benefits and the lack of a precise formula to calculate each family's net benefit does not alleviate the Supreme Court's fundamental objection to the Nyquist tax relief provision, that the money "represents a charge made upon the state for the purpose of religious education." Hence, the crucial issue raised by Mueller and Norberg is not whether a tuition tax deduction is constitutionally more permissible than a tuition tax credit, but whether broadening the beneficiary class to include public school parents who pay tuition distinguishes the disputed statutory scheme from tuition tax relief benefiting only nonpublic school parents.

C. THE BREADTH OF THE BENEFITED CLASS

Walz and Nyquist do not resolve the dispute between the

one's children to college. Id. A much better argument can be made for allowing a deduction for the student, computed by capitalizing the student's educational expenses and amortizing them over the useful life of the education. See McNulty, supra note 155, at 16-36. Compared with higher education expenditures, however, expenditures for private elementary and secondary education reflect a consumption decision, not an income producing investment decision. See Wolfman, supra note 155, at 551. See Wolfman, supra note 155, at 551.


160. See McNulty, supra note 155, at 80; Wolfman, supra note 155, at 540.

161. 676 F.2d at 1203.

162. See supra notes 126-30 and accompanying text.

163. 676 F.2d at 1204.

First and Eighth Circuits over the significance of the breadth of the class benefited by tuition tax deductions. Although breadth of class was one factor the Nyquist Court used to distinguish Walz, the opinion did not clearly indicate whether the de jure or the de facto class was intended. In contrasting the two statutes, the Nyquist Court emphasized the narrow de facto class benefited by the tax credits but mentioned only the broad de jure class eligible for the property tax exemption upheld in Walz. This apparent ambiguity might merely reflect the lack of statistical evidence available to the Walz Court regarding the breadth of the de facto class. On the other hand, when the Nyquist Court intimated in a footnote that a statute which made scholarships generally available might be constitutional, it was apparently referring to a broad de jure class. This ambiguity in Nyquist has not been resolved by the Court's subsequent tax benefit decisions, which have dealt only with statutes benefiting classes which were de jure narrow as well as de facto narrow. Thus, the Supreme Court's decisions do not clearly resolve the Norberg-Mueller debate over the significance of de facto and de jure classes.

In addition, Walz and Nyquist do not answer the question whether a broad beneficiary class is sufficient by itself to render a tuition tax benefit constitutional. The Nyquist Court distinguished Walz on three grounds besides the difference in breadth of the benefited classes. The property tax exemptions in Walz, unlike the tuition tax credits in Nyquist, had a long history of acceptance; the exemptions were designed to prevent hostility to religion, whereas the tuition credits subsidized religion; and the exemptions, unlike the tuition credits, were less entangling than the alternative of taxation. The Court expressly declined to say whether the breadth of the benefited

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165. See 413 U.S. at 794. See also supra text accompanying note 95.
166. See 413 U.S. at 794.
167. See id.
168. See Walz, 397 U.S. at 666-67.
169. See Nyquist, 413 U.S. at 783 n.38.
171. See supra note 91.
172. 413 U.S. at 792. See also supra text accompanying note 93.
173. 413 U.S. at 793. See also supra text accompanying note 94.
174. 413 U.S. at 793.
class would be dispositive in some situations, \(^{175}\) and it has not yet addressed that issue in subsequent school aid cases. Thus, the Court's opinions do not favor either Norberg's focus on breadth of class or Mueller's approach of weighing this factor along with other considerations.

Although the Supreme Court case law offers little assistance in assessing the constitutionality of the Rhode Island-Minnesota scheme of deductions, an examination of the principles underlying the establishment clause points to a solution. It is perhaps idle to speculate on the purposes for which the establishment clause was originally adopted.\(^ {176}\) Nevertheless, agreement among the Supreme Court and commentators as to the principles embodied in the clause is sufficiently great to guide the decision of the Norberg-Mueller conflict. Although the establishment clause may serve other goals, it certainly protects political equality among religions,\(^ {177}\) church autonomy,\(^ {178}\) and religious liberty.\(^ {179}\) Together these principles point toward the

\(^{175}.\) Id. at 794.

\(^{176}.\) See, e.g., Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle, 81 HARV. L. REV. 513, 516 (1968) ("It is impossible to find substantial agreement among scholars as to what political principles are embodied in the establishment clause."). Some commentators maintain that the establishment clause was intended only to prevent a nationally established church. See, e.g., Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 WASHBURN L.J. 65, 84-85, 127-30 (1962); Murray, Law of Prepossessions?, 14 LAW & CONTEMP. PROB. 23, 41-43 (1940); Snee, Religious Establishment and the Fourteenth Amendment, 1954 WASH. U.L.Q. 371, 373-94. Commentators have also presented historical evidence that the Framers intended only to prevent legal constraints on freedom of conscience and the free exercise of religion. See M. Howe, The Garden and the Wilderness 19 (1965); Murray, supra, at 50-51, 41-43. The Supreme Court has rejected both of these positions while acknowledging the historical support for them. See Abington School Dist. v. Schempp, 374 U.S. 203, 233-35 (1963) (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 420-25 (1962). Regardless of the Framers' original intent in adopting the establishment clause, the subsequent growth of the state's role in allocating resources and structuring the social order has caused the issue of church-state involvement to become fundamentally different from that confronting the Framers. Giannella, supra, at 514-15.

\(^{177}.\) "Neither a state nor the Federal Government... can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Educ., 330 U.S. 1, 15 (1943). See also Giannella, supra note 176, at 517; Merel, The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment, 45 U. CHI. L. REV. 805, 810 (1978).

\(^{178}.\) See Wolman v. Walter, 433 U.S. 229, 266 n.7 (1977) (Stevens, J., concurring in part and dissenting in part) (aid to private schools harms religion by forcing schools to relinquish religious exclusivity and avoid textbooks which present a religious perspective on secular subjects). See also M. Howe, supra note 176, at 19; Giannella, supra note 176, at 517; Katz, Radiations from Church Tax Exemption, 1970 SUP. CT. REV. 93, 97.

breadth of the de facto benefited class as the pivotal factor in cases involving tax benefits that aid religious institutions.

By ensuring political equality among religious sects, the establishment clause protects against the political ascendancy of one religious sect over another.\textsuperscript{180} Although some degree of religious influence on politics is necessary and proper, the establishment clause helps to insulate the political process from interfaith rivalry.\textsuperscript{181} Legislation that primarily aids sectarian education disrupts political equality and promotes rivalry among religious sects by favoring those groups that emphasize private primary and secondary education.\textsuperscript{182} Narrowly sectarian aid also gives rise to recurrent dissension among religious sects over the allocation of public monies, because religious

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See also Choper, The Establishment Clause and Aid to Parochial Schools, 55 CAL. L. REV. 260, 267-68 (1968); Freund, Public Aid to Parochial Schools, 82 HARV. L. REV. 1630, 1684 (1969); Giannella, supra note 176, at 517.
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181. Walz, 397 U.S. at 695 (opinion of Harlan, J.). See also Freund, supra note 173, at 1692; Giannella, supra note 176, at 517.
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182. Sectarian groups are not new in America. On the eve of the Revolution, the groups were "numerous" and "universal." B. Bailyn, Education in the Forming of American Society 39-40 (1972). Even the established churches lacked legal authority to compel allegiance, and all sects faced the threat of erosion, particularly among the young. Id. Out of this context arose the sectarian school whose mission was to "[aid] one group to survive in a world of differing groups." Id.
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A similar motivation was behind the rise of Catholic elementary and secondary schools in the 1830's and 1840's. Some Catholic commentators emphasize the relationship between the rise of the public school movement of that era, the first large influx of Irish Catholics, and the growth of nativist groups such as the "No-Nothing Party." House Hearings, supra note 1, at 227 (statement by Marilyn Lundy, President, Citizens for Educational Freedom). These commentators charge that the early public schools, founded by Protestants, exuded Protestant values through school prayers, reading of the King James version of the Bible, the observance of Protestant holidays, and the nonobservance of Catholic and Jewish holidays. 124 CONG. REC. 25,813 (1978) (statement by Sen. Moynihan). The Catholic perception of public schools as Protestant dominated helps explain the growth of Roman Catholic private elementary and secondary schools.

Another highly vocal group favoring tuition tax relief consists of evangelical Christian schools. 124 CONG. REC. 26,090 (1978) (statement of Sen. Helms). The common mission of Catholic and evangelical Christian schools seems ironic, for Catholic schools have rejected public schools because of their Protestant flavor, while evangelical Christian schools reject public schools because that Protestant atmosphere has dissipated in the wake of Supreme Court rulings outlawing school prayer and Bible reading. Id. at 25,810 (statement of Sen. Packwood). Both Catholic and evangelical Christian schools, however, share the pressure of rising costs, and now other sectarian schools have joined in the common quest for school aid. Jewish Day Schools, Episcopalians, and Missouri Synod Lutherans are the most numerous groups. Morgan, supra note 1, at 59. See also 124 CONG. REC. 25,663 (1978).
groups will lobby the legislature to maintain or increase aid. In contrast, aid which broadly benefits secular as well as sectarian groups is less likely to generate interfaith rivalries or imbalances of power. Even if only some sects receive aid directly, members of other faiths will probably benefit as members of the broader legislative class. Because particular religious groups will not be perceived as the primary beneficiaries of state aid, competition among sects for government funds will also be reduced.

Legislation that primarily aids sectarian groups indirectly threatens to violate churches' autonomy over their religious affairs. Such aid subtly pressures sectarian schools to become more secular, for as schools attempt to persuade state legislatures to maintain or increase the aid, they may alter their curricula to create an appearance of secularity, at the expense of their religious uniqueness. Justice Stevens noted the danger of government intrusion when he wrote, "I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it." An example of this phenomenon is direct aid to nonpublic schools in British Columbia, which has had a dramatically negative effect on nonpublic students' and parents' perceptions of their schools' uniqueness, responsiveness, and social cohesion. Aid narrowly directed to sectarian schools thus tends to destroy the very diversity and uniqueness which it purports to preserve. In contrast, legislation that generally aids education does not affect church autonomy in religious affairs. If sectarian schools are not the primary beneficiaries, there will be less pressure on sectarian schools to avoid the appearance of constitutional impropriety by becoming more secular.

Aid directed primarily to sectarian schools infringes religious liberty by forcing individual taxpayers to support religious faiths to which they do not adhere. Admittedly, general aid to education which includes religious schools would also use some taxpayers' dollars to aid religions they do not choose to support. The general nature of the aid makes this in-
fringement on religious liberty more tolerable for two reasons, however. First, the breadth of the de facto class tends to show that the purpose of the law is not to benefit religion specifically but to achieve a broader social goal. Thus, the aid taxpayers' dollars provide to religious institutions is incidental to the purpose of the legislation, so it is less clear than in the case of narrowly drawn aid that taxpayers' religious liberty is infringed. Second, to eliminate the possible infringement resulting from this incidental benefit, the legislature would have to amend the general legislation to exclude all aid to religious institutions. This type of amendment would actively discriminate against religion, however; and the establishment clause is designed in part to prevent government hostility to sectarian groups.

The Eighth Circuit counseled against "blind adherence" to the importance of the breadth of the de facto beneficiary class, concluding instead that a state may extend benefits without regard to the religious beliefs of the beneficiaries, if the benefits have a public purpose and fulfill a public need. The court maintained that state provision of a deduction for tuition paying public school parents could be deemed a public need. Hence, the Court hypothesized that a state should be able to extend this benefit to parochial school parents in order to equalize benefits. Nyquist explicitly rejected this argument, however. The Court in Nyquist noted that the grants to private school parents augmented their children's right to receive free public education, and added:

[T]he argument proves too much, for it would also provide a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.

The Eighth Circuit failed to recognize that, if a state may grant

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187. For example, provision of police, fire, and sewer services for churches or church schools arguably benefits religion, but these services do not benefit religion more than businesses or residences. See, e.g., Everson, 330 U.S. at 60-61 (Rutledge, J., dissenting).
188. If a state were to deny a religion police and fire protection, the denial would pose a free exercise dilemma, as the state protection would be withheld because of religious beliefs. See Giannella, supra note 176, at 520-21.
189. 676 F.2d at 1205.
190. Id. (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947)).
191. 676 F.2d at 1205.
192. Id.
193. Id.
194. 413 U.S. at 782 n.38.
195. Id. (emphasis in original).
benefits exclusively to religious schools for the purpose of extending benefits previously given only to public schools, then the only limit on state aid to religion will be the legislature’s imagination and resourcefulness in finding public school “benefits” that must be “equalized.” If the establishment clause is to provide any meaningful limit on state aid to religion, this result is untenable.

IV. A PROPOSED STANDARD FOR ESTABLISHMENT CLAUSE REVIEW OF TAX BENEFITS THAT AID RELIGIOUS INSTITUTIONS

The preceding analysis led to the conclusion that the deciding factor in cases involving tax benefits that aid religious institutions should be the proportion of actual beneficiaries whose benefits result from religious activity. To be viable, however, this criterion must be elaborated.

A. DEFINING DISPROPORTIONATE BENEFIT

The Mueller court concluded that a statistical definition of disproportionate benefit would be unnecessarily rigid. Any maximum permissible percentage of religious beneficiaries would be arbitrary and inappropriate in light of the constitutional status of the criterion. For example, the constitutionality of a statute might vary from year to year depending on a statistical breakdown of sectarian and nonsectarian institutions benefited by the legislation. Another problem, not mentioned by the Mueller court, is that a purely statistical approach assigns no relative weight to sectarian and nonsectarian beneficiaries. The legislature might, for example, believe that benefiting a relatively small secular class is very important, but it might extend benefits to sectarian groups as well, merely to avoid discriminating against religion. Under a purely statistical criterion, however, such a statute would be invalid. It seems that some less rigid definition of disproportionate benefit is required.

The district court in Norberg concluded that Rhode Island's extension of the law to include five percent secular beneficiaries amounted to “mere window dressing.” This observation suggests a more workable definition of disproportionate

196. 697 F.2d at 1200-01 n.13.
197. Id.
198. Id.
benefit. It is likely that underlying the district court's conclusion was the belief that the primary purpose of the law was to provide relief for parents of sectarian school children. In keeping with this approach, a definition of disproportionate benefit should invalidate any law which has no substantial purpose other than to aid religious institutions, even if its purpose is "secular" under the Court's current test.\textsuperscript{200} The following definition of disproportionate benefit achieves this result. Tax benefit legislation disproportionately aids religious institutions if and only if the state would not have a substantial interest in enacting the legislation if the legislation excluded all benefits to religious institutions. Thus, legislation is sufficiently broad to pass constitutional muster only if the government's interest in the legislation does not depend on the benefits it provides to religious institutions. The virtue of this definition is its flexibility. It establishes no statistical threshold for constitutionality and thus allows courts to assess the weight the legislature assigns to secular and sectarian benefits.

\textbf{B. Scope of the Criterion}

The proposed criterion should cover all cases involving tax benefits that aid religious institutions. Thus, in addition to tax relief for school related expenses, this test would apply to tax exemptions for religious institutions such as those upheld in \textit{Walz},\textsuperscript{201} and to charitable deductions.\textsuperscript{202} The criterion thus bridges the gap between \textit{Walz} and \textit{Nyquist}\textsuperscript{203} by explaining why a broad de facto class such as the one presumed in \textit{Walz}\textsuperscript{204} should be valid but why a broad de jure but narrow de facto class such as the one involved in the Rhode Island-Minnesota scheme\textsuperscript{205} should not. In addition, this criterion answers the objection, raised by the \textit{Mueller} court,\textsuperscript{206} that a purely statistical analysis should not be sufficient to invalidate tax laws providing charitable deductions. Even if it could be shown that the majority of such deductions were claimed for contributions to religious institutions, there might be a substantial government interest in encouraging contributions to secular charities.

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\textsuperscript{200} See \textit{supra} text accompanying notes 35-38 for discussion of the Court's present "secular purpose" test.
\textsuperscript{201} 397 U.S. 664, 666 (1970). \textit{See supra} text accompanying notes 73-82.
\textsuperscript{202} See, \textit{e.g.}, L.R.C. \textsection{} 170 (1982).
\textsuperscript{203} See \textit{supra} text accompanying notes 165-75.
\textsuperscript{204} 397 U.S. at 666-67 \& n.1; \textit{Nyquist}, 413 U.S. at 794.
\textsuperscript{205} See \textit{supra} notes 116-34 and accompanying text.
\textsuperscript{206} 676 F.2d at 1200-01 n.13.
especially if the legislature hoped to increase secular charitable giving through enacting the deduction.

This criterion should not, however, be extended to apply to aid other than tax benefits. If the breadth of benefited class analysis were used to validate construction and maintenance grants or funds for instructional materials the state could subsidize virtually any improvement in religious education, as long as it could demonstrate a substantial interest in making similar improvements in secular education. Strictly speaking, this sort of program would not be the same as the complete subsidization of religious education decried in dicta in *Nyquist*. Nevertheless, application of the breadth of class test to direct grants to schools would permit complete subsidization of all improvements in religious education which accompany identical improvements in secular education. This result seems as inconsistent with the establishment clause as the complete subsidization the *Nyquist* dicta rejected.

C. THE DISPROPORTIONATE BENEFIT CRITERION AND THE THREE PRONG TEST

The proposed disproportionate benefit test is, in effect, a criterion for determining the primary effect of tax benefits which, in part, aid religious institutions. Courts should use this criterion only to decide whether challenged tax benefits provide purely incidental aid to religion and thus are distinguishable from the tax credits the *Nyquist* Court held had the primary effect of aiding religion. Thus, a relief scheme which benefits a broad class of beneficiaries may still be invalidated under the excessive entanglement test. For example, if the textbook and instructional materials deductions in the Rhode Island and Minnesota statutes had benefited a broad de facto class, the statutes would still be invalid under the excessive entanglement test. To determine whether the textbooks and materials met the statutory requirement that they not be religious in character, the state would have had to engage in the

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207. *See, e.g., Nyquist, 413 U.S. at 774-80* (invalidating state maintenance and repair grants to sectarian elementary and secondary schools).
208. *See supra* notes 65-72 and accompanying text.
209. *413 U.S. at 782 n.38. See supra text accompanying notes 194-95. The "equalization" in *Nyquist* consisted of states acting to redress a presently existing inequality of position between public and nonpublic schools or parents. 413 U.S. at 782 n.38. The "equalization" referred to in the text consists of states making simultaneous grants to both public and nonpublic schools or parents.
210. *413 U.S. at 793.
211. *See supra* notes 135-45 and accompanying text.
continuing surveillance which the *Norberg* court correctly concluded would ultimately lead to excessive church-state entanglement.212

V. CONCLUSION

In the first major Supreme Court establishment clause case in 1947, Justice Rutledge foretold the future of establishment clause litigation with uncanny accuracy:

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain private funds for the aid and support of various private religious schools.213

Recent congressional efforts to reinstate prayer in public schools illustrate the continuing vitality of the first "great drive."214 Federal tuition tax credit initiatives215 and the tuition tax deduction schemes considered in *Norberg* and *Mueller* show that the second "great drive" is also alive and well.

The persistence of the legislative desire to aid private schools, however, does not necessarily imply that these measures will or should be found constitutionally permissible. The tuition tax deduction scheme challenged in *Norberg* and *Mueller* cannot be adequately distinguished from the tuition tax credit statute the Supreme Court invalidated in *Nyquist*. The Supreme Court could greatly clarify the scope of permissible state aid to private education through tax benefits by applying the proposed disproportionate benefit criterion to assess primary effect in such cases. This approach would provide a workable and familiar test while avoiding the arbitrary results a rigid statistical analysis would yield.

212. 630 F.2d at 861-62. *See supra* notes 99-106 and accompanying text.

