

1-1-1987

The Establishment Clause and Aid to Parochial Schools-An Update

Jesse H. Choper
Berkeley Law

Follow this and additional works at: <https://scholarship.law.berkeley.edu/facpubs>



Part of the [Courts Commons](#)

Recommended Citation

The Establishment Clause and Aid to Parochial Schools-An Update, 75 Cal. L. Rev. 5 (1987)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The Establishment Clause and Aid to Parochial Schools—An Update

Jesse H. Choper†

Nearly twenty years ago, when my article entitled “The Establishment Clause and Aid to Parochial Schools” appeared in the pages of this law review,¹ there had been only one significant decision of the Supreme Court dealing with the subject. *Everson v. Board of Education*² upheld a New Jersey township’s payment of the cost of bus transportation for children going to and from all nonprofit schools, including those that were church related. Within a month of the article, the Court, continuing down the path broken in *Everson*, decided *Board of Education v. Allen*,³ upholding a New York program for lending state approved secular textbooks to children in all secondary schools, including those that were church related.

In 1971, however, the Burger Court used the decision of *Lemon v. Kurtzman*⁴ to fully articulate its now famous three-part test for judging alleged violations of the establishment clause and for the first time invalidated a program providing aid to parochial schools. The Court had before it statutes from Pennsylvania and Rhode Island that provided for the direct payment, either to the schools or to the instructors, of salary supplements for teachers of secular subjects. More specifically, the Rhode Island statute authorized state augmentation of up to fifteen percent of the salary paid private school teachers of secular subjects such as mathematics, physical science, modern foreign languages, and physical education. The opinion was written by Chief Justice Burger, with only Justice White (who has consistently voted to uphold aid to parochial schools) dissenting.

The Court found that the statutes had a secular, as opposed to a

† Dean and Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.S. 1957, Wilkes College; LL.B. 1960, University of Pennsylvania; D. Hu. Litt. 1967, Wilkes College.

This comment is based on a lecture delivered at a Federal Judicial Center Seminar on Constitutional Adjudication and the Judicial Process in the Federal Courts, June 19, 1986, at Boalt Hall School of Law, University of California, Berkeley. Research support for this lecture was provided by the Max Weingarten Fund.

1. Choper, *The Establishment Clause and Aid to the Parochial Schools*, 56 CALIF. L. REV. 260 (1968).

2. 330 U.S. 1 (1947).

3. 392 U.S. 236 (1968).

4. 403 U.S. 602 (1971).

religious, purpose, thus satisfying the first element of its three-part test. This part of the *Lemon* test has subsequently proven to be of little consequence where aid to parochial schools is at issue. In virtually all such cases, the Court has conceded that there was an adequate secular purpose—for example, seeking to improve the quality of education received by children who attend church related schools.

The other two prongs of the three-part *Lemon* test are that the challenged program (1) must have a primary effect that does not advance religion, and (2) must not result in excessive entanglement between government and religion. In *Lemon*, the Court hung the states (and the recipient church related schools) on the horns of a dilemma with respect to these two parts of the test. The Court began with a critical premise: the mission of church related elementary and secondary schools is to teach religion, and all subjects either are, or carry the potential of being, permeated with religion. Therefore, if the government were to help fund any subjects in these schools, the effect would aid religion unless public officials monitored the situation to see to it that those courses were not infused with religious doctrine. But if public officials did engage in adequate surveillance—this is the other horn of the dilemma—there would be excessive entanglement between government and religion, the image being government spies regularly or periodically sitting in the classes conducted in parochial schools.

It is fair to say that subsequent decisions have produced a conceptual disaster area. Let me just sketch the landscape before turning to a more detailed examination of the Court's most recent opinions.

The Court has held, on the one hand, that government can finance the bus transportation of children to parochial schools⁵ but, on the other hand, that government cannot finance the bus transportation for field trips from these parochial schools to cultural and scientific centers, such as museums.⁶ This is an extremely difficult distinction to maintain.

The Court has held, on the one hand, that the state can lend state approved secular textbooks to students who attend parochial schools⁷ but, on the other hand, that the state cannot lend instructional materials (such as maps, films, movie projectors, or laboratory equipment) either to the students⁸ or to the schools.⁹ What makes a textbook less religious than a map is something that I have yet to discern. Perhaps time will demonstrate the wisdom of the distinction.

On the question of "auxiliary services," such as remedial courses or

5. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

6. *Wolman v. Walter*, 433 U.S. 229 (1977).

7. *Allen*, 392 U.S. 236; *Wolman*, 433 U.S. 229.

8. *Meek v. Pittenger*, 421 U.S. 349 (1975).

9. *Wolman*, 433 U.S. 229.

guidance counseling, the Court has held, on the one hand, that if a public school teacher enters the parochial school to provide such services, that violates the establishment clause¹⁰ but, on the other hand, if these same services are offered by these same teachers to these same parochial school students outside of the parochial school, it is valid—even if the services are provided in a mobile unit that is parked right at the curb of the parochial school.¹¹ This is an interesting geographic distinction, but difficult to justify as having constitutional significance.

On the issue of the administration and grading of achievement tests required by the state, the Court has held, on the one hand, that if the parochial school teachers prepare the tests, it is unconstitutional for the state to finance them¹² but, on the other hand, it is not unconstitutional if state officials prepare the tests, even though they are administered and graded by the parochial school teachers.¹³ Another remarkably fine distinction.

Finally—and more important from a practical standpoint because of the large sums of money potentially involved—there is the matter of tax benefits. In 1973, in *Committee for Public Education v. Nyquist*,¹⁴ the Court considered a New York program that gave a partial tuition tax credit to parents who sent their children to nonpublic schools, including those that were church related. For those parents too poor to be liable for income taxes and therefore unable to benefit from a tax credit, New York gave an outright grant of up to fifty percent of tuition. The Court, speaking through Justice Powell, held this program invalid because its primary effect was to aid religion. The rationale, which is realistic enough, was that if the state gives a tax credit to the parents, they will funnel the money to the parochial school. There were three dissenters in *Nyquist*—Justice White (who, as I mentioned, has consistently been on this side), Justice Rehnquist (who had been appointed to the Court since *Lemon*), and Chief Justice Burger (who had begun to depart from his rather strict separationist position in *Lemon*).

A decade later, in *Mueller v. Allen*,¹⁵ the Court considered a very similar tax benefit plan. Minnesota had given parents who sent their children to any nonprofit school (public, private, or church related) a tax deduction (rather than a tax credit as in *Nyquist*) for any expenditures they made for transportation and tuition and for the cost of textbooks, instructional materials, and equipment—as long as these were not used

10. *Meek*, 421 U.S. 349.

11. *Wolman*, 433 U.S. 229.

12. *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973).

13. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980).

14. 413 U.S. 756 (1973).

15. 463 U.S. 388 (1983).

to teach religion. Most observers felt that there was no constitutional distinction between this Minnesota tax deduction program and the New York tax credit scheme of ten years earlier. But the Court found a difference. Justice Rehnquist, writing for a five-to-four majority, held that there was no violation of the establishment clause. He was joined, not unexpectedly, by Chief Justice Burger and Justice White. He was also joined by Justice O'Connor, who was addressing this general subject for the first time. The surprise was that he was also joined by Justice Powell, who had written the Court's opinion in *Nyquist* striking down the New York tax credit. Justice Rehnquist quoted large portions of Justice Powell's statements from other opinions, probably in order to secure his vote.

The opinion's analysis proceeded at several levels. Justice Rehnquist found a secular purpose—to improve the education of all children. He reasoned that a tax deduction is a state subsidy of education and that private schools were included because they provided a competitive model for public schools. Moreover, the opinion said, private schools, including those that are church related, relieve a financial burden on the public school system: it would cost much more to educate children in public schools than to give them this relatively modest subsidy to go to private schools.

Next, Justice Rehnquist concluded that the effect of the statute was not primarily to advance religion. Preliminarily, he pointed out that this was only one of many tax deductions that Minnesota provided. Just as the state gave a deduction for charitable contributions and medical expenses, so, too, it gave a deduction for educational expenses. This point is analytically unsound. It is no different than saying that an appropriation to build a new Lutheran church in St. Paul would be only one of many appropriations by the Minnesota legislature. It follows from Justice Rehnquist's reasoning that since Minnesota appropriates money for the University of Minnesota and for all kinds of other things, an appropriation to build a Lutheran church should be treated just like one of many appropriations. But the establishment clause is plainly meant to prohibit some things, even though they are much like other things, if they involve religion.

Justice Rehnquist's major task, however, was to distinguish *Nyquist*. From all appearances, New York had tried to do in *Nyquist* exactly what Minnesota was trying to do in *Mueller*—provide some financial relief to parents who sent their children to private schools, including parochial schools. In *Nyquist*, New York did it through tax credits and grants. In *Mueller*, Minnesota did it exclusively through tax deductions. (Note, however, that New York had done it only for children attending private schools; Minnesota did it for those in public schools as well as private schools.)

Directly confronting *Nyquist*, Justice Rehnquist conceded that the economic consequences for parochial schools, of the New York program that the Court had struck down in *Nyquist* and of the Minnesota program that it was now going to uphold, were "difficult to distinguish."¹⁶ But to say that it was difficult did not mean that he found it impossible.

Justice Rehnquist used two grounds, one major and one minor, to find that *Nyquist* was inapposite. First, he said that there was a genuine tax deduction in *Mueller*, whereas in *Nyquist* there was a tax credit and an outright grant. Of course, there is a difference between a tax deduction and a tax credit, depending especially upon your income bracket. And both are different from a direct grant, particularly for people who do not have enough net income to take advantage of a tax credit or a tax deduction. Nonetheless, it is difficult to dispute the point made in the dissent of Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, that, in realistic economic terms, this is a "formalistic distinction."¹⁷

Justice Rehnquist's major distinction of *Nyquist*, however, was that the Minnesota statute was facially neutral because, unlike the New York statute, it aided *all* parents, including those who sent their children to public schools. Justice Rehnquist drew upon language from *Nyquist* (written by Justice Powell) that left open the possibility of providing scholarships to *all* children, rather than only those attending private schools. Relying upon a more recent decision authored by Justice Powell,¹⁸ he reasoned that when the government assists a broad class of beneficiaries, the effect is not primarily to advance religion.

Although the point is plausible, it does not survive closer analysis. The record in *Mueller* showed that ninety-six percent of the Minnesota tax deductions for tuition were taken by parents who sent their children to parochial schools. (There were only seventy-nine students attending public schools who deducted tuition, which they paid because they went to a public school outside their district for some special reason. In addition, as Justice Marshall pointed out in dissent, parents of children who attended public schools in their district were able to take *some* deductions—for example, for the cost of pencils, notebooks, gym clothes, and other incidental items that public schools do not provide.) Justice Rehnquist's response was that the Court was unable to deal with statistical effects on a case-by-case basis. That the statute is neutral on its face, despite the actual facts, was enough to satisfy the effect prong of the Court's three-part test. A further difficulty in this connection is that, in reality, the facts were for all practical purposes the same in *Nyquist*:

16. *Id.* at 396 n.6.

17. *Id.* at 411.

18. *Widmar v. Vincent*, 454 U.S. 263 (1981).

although the New York statute gave tax credits only to parents who sent their children to nonpublic schools, parents who sent their children to public schools did not need the benefit of the tax credit. They had the entire "tuition" (and most other expenses) paid for from public funds to begin with.

It was perfectly clear in *Mueller* that the primary effect of the Minnesota tax deduction was to favor children who went to parochial schools. When the "effect" prong of the Court's test stood in the way of a result that the Court wanted to reach, it simply ignored any realistic application of its doctrine.

Another point made by Justice Rehnquist was that, unlike the situation in *Mueller*, most prior decisions invalidating aid to parochial schools involved aid granted directly to the schools. This was not true, however, in *Nyquist*; indeed, the side that lost had argued that *Nyquist* had foreclosed that issue.¹⁹ Moreover, what difference does it make whether the aid goes directly to the schools rather than to the parents? Ultimately, as the Court recognized in *Nyquist*, it ends up in the coffers of the schools in both instances.

In *Mueller*, Justice Rehnquist reasoned that if the aid goes to the parents, their individual choice is required before it reaches the parochial schools. Therefore, the state is not putting its imprimatur on the parochial school; the parents make the decision, not the state. But what is the difference between (1) the state giving the money to the parents who have made the choice to send their children to parochial schools, and (2) the state giving the money to the parochial schools to which the parents have chosen to send their children? Individual choice is no more facilitated by giving the money to the parents, who in turn hand it over to the parochial schools, than by giving it directly to those schools which have previously had the children handed over to them by the parents.

Finally, Justice Rehnquist addressed the issue of excessive government entanglement. Justice Rehnquist, who has been a critic of the entanglement prong of the Court's three-part test,²⁰ simply found no problem here: Minnesota was not sending any officials into the parochial schools to engage in any surveillance. The Court's point in the prior cases was that official monitoring was needed to insure that public money was not spent for religious purposes. There was no entanglement in *Mueller* because there was no surveillance. But there was also no protection whatever that the ultimate recipients of this aid would not use it for religious purposes.

19. Brief for Petitioners at 60-62, *Mueller v. Allen*, 463 U.S. 388 (1983) (No. 82-195).

20. Justice Rehnquist's dislike of the entanglement prong is well-founded. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681-83 (1980) (criticizing entanglement part of Court's test).

The major conclusion to be drawn from *Mueller v. Allen* is that it opened a large window for aid to parochial schools. After *Lemon* and its progeny, states had only narrow opportunities for providing financial assistance to church related schools. After *Mueller*, the issue has become simply a matter of form. For example, what New York should have done in *Nyquist*, and what it may well do in response to *Mueller*, is amend its invalidated statute to provide the tax credits to parents who send their children to public schools as well. It would cost New York little to do so because there would be virtually no credits taken by such parents.

In 1985, the Court again confronted the question of "auxiliary services" (remedial and enrichment courses in such areas as mathematics, reading, art, music, and physical education) for parochial school students offered by public school teachers on parochial school premises. A case from New York, *Aguilar v. Felton*,²¹ involved Title I of the Elementary and Secondary Education Act of 1965. The Court, in a five-to-four decision, properly held that the prior rulings controlled and that the Title I auxiliary services program therefore violated the establishment clause. The line up was quite predictable, Justice Powell again being the swing vote. He found that the program was unconstitutional, although a year earlier he had found that the Minnesota tax deduction was constitutional.

The Title I cultural enrichment courses were available in public schools as well as private schools. That distinction appealed to Justice Powell in the Minnesota tax deduction case, but not in *Aguilar* when the aid went directly to the schools. Eight Justices could find no difference between the Minnesota tax deduction plan and the Title I auxiliary services. Four of them would hold both unconstitutional; four would uphold them both. Justice Powell was in the middle.

Thus, at the end of 1985, a tax deduction to *all* parents who sent their children to schools was valid. The practical problem, as noted above, was that this was of no value to poor people, for whom a tax deduction was essentially meaningless. Low income parents could be helped if public school teachers went to parochial schools to provide enrichment or remedial courses, but only as long as the courses were conducted off the parochial school's premises, even if in a mobile unit parked at the curb. The difficulty was that, at least in some large cities, that could not be done logistically. Justice O'Connor, dissenting in *Aguilar*, pointed out that there were 20,000 children in New York City alone who were in need of auxiliary services who could not be provided with them as a practical matter.

21. 105 S. Ct. 3232 (1985).

The great uncertainty that remained concerned the question of school vouchers, an idea whose time may be near. The Reagan Administration has sponsored voucher plans several times,²² and such plans would likely receive bipartisan support.²³ Several years ago, a Gallup Poll revealed that, for the first time, a majority of the people favored vouchers.²⁴ The major barrier at present may well be only fiscal.

A powerful objection to proposed voucher schemes had concerned their constitutionality. It had been argued that use of the vouchers in church related schools would violate the establishment clause. On the one hand, vouchers would be available to *all* parents. But, on the other hand, if the Court was serious in *Mueller* about a tax deduction for parents being constitutionally distinguishable from a grant to parents, then vouchers would be invalid.

The constitutionality of vouchers was apparently resolved in 1986, although the decision in *Witters v. Washington Department of Services for the Blind*²⁵ must be read carefully in order to discern the answer. The case involved a Washington program to provide vocational educational assistance to the visually handicapped. A blind person could get a voucher (although it was not called that) and use it in a vocational school for the blind. The recipient was studying at a Christian college "in order to equip himself for a career as a pastor, missionary or youth director."²⁶ The Court plainly assumed that he was studying religion. But, in a unanimous decision written by Justice Marshall—one of the strictest separationists on the Court—the Court held that there was no violation of the establishment clause.

Justice Marshall's relatively short opinion, which I think suffers from not having had to respond to dissents, poses as its central question whether the program's effect was primarily to aid religion. In finding that it was not, he reasoned, first, that this aid went to the student, not to the school; although the school benefited, it did so as the result of the private choice of the individual recipient. Apart from the analytic weakness of this point, it is interesting to note that this distinction had not only been rejected by a majority of the Court in *Nyquist* in 1973, but also by Justice Marshall and the three members of the Court who joined his persuasive dissent in *Mueller* just three years earlier. Justice Marshall also reasoned, contrary to his position in *Mueller*, that the aid provided by the Washington program was available for expenditure in *all* schools,

22. See Safire, *Reagan's Good Deed*, N.Y. Times, Nov. 3, 1985, at E21, col. 1.

23. See S. 550, 97th Cong., 1st Sess. (1981) (tuition tax credit bill sponsored by Senators Moynihan and Packwood); Donnelly, *Little Hope Seen for Tuition Tax Credit Plan*, 40 CONG. Q. WEEKLY REP. 911 (1982).

24. N.Y. Times, Sept. 6, 1983, at C7, col. 4.

25. 106 S. Ct. 748 (1986).

26. *Id.* at 750.

and, under an empirical approach that the Court rejected in *Mueller*, that the record showed that at no time in the history of the Washington program (apart from this case) had any public funds been spent in a religious school. Thus, he concluded, the primary effect of this program was not to advance religion.

It is in concurring opinions, however, rather than in Justice Marshall's opinion for the Court, that the voucher issue is resolved. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred separately, expressing concern that the opinion for the Court did not rely more specifically on *Mueller*.²⁷ Justice Powell then emphasized that the Washington program does not have a primary effect that advances religion because, quoting from *Mueller*, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries."²⁸

In addition to Justice Powell's concurrence, Justices White and O'Connor wrote separate opinions agreeing with Justice Powell with respect to the significance of *Mueller*. These five Justices (who comprised the majority in *Mueller v. Allen*) clearly described a situation that includes vouchers: the aid goes to all parents who have children in schools—public, private, and parochial; if the vouchers are cashed at parochial schools, that is the product of private choice. Thus, vouchers are now valid but, on the other hand, if aid is provided directly to the schools, it will usually be held invalid. That is where the law stands.²⁹

My approach, not generally in harmony with the Supreme Court's stance, is that the courts should find a violation of the establishment clause only when the following two criteria are met: first, there must be a purpose to aid religion; second, there must be some effect that meaningfully endangers religious liberty.³⁰ With respect to the second criterion, both historically and contemporarily, a meaningful danger to religious liberty is posed when compulsorily raised tax funds are expended for religious purposes.³¹ It violates my religious liberty to have my tax raised funds spent for even my own religion, and it compounds the violation if

27. I think that was somewhat disingenuous on Justice Powell's part. Of course, Justice Marshall should not be expected to rely on *Mueller*; he dissented in that case. It seems likely that there was a unanimous vote to uphold this program; having obtained Justice Marshall's vote, the Chief Justice probably sought to keep it by assigning him the opinion.

28. *Witters*, 106 S. Ct. at 754 (footnote omitted).

29. I seriously doubt that the recent change in the Court's personnel is going to affect that conclusion. The odds are that Justice Scalia is not going to be meaningfully different than Chief Justice Burger on the question of aid to parochial schools.

30. Choper, *supra* note 20, at 675; Choper, *supra* note 1, at 265-66.

31. Choper, *supra* note 20, at 677-78.

they are spent to support some religion with which I am not affiliated or with whose precepts I disagree.

Under that standard, I pointed out in the *California Law Review* that most aid to parochial schools would probably be upheld.³² There is a secular purpose as long as the amount of the government expenditure does not exceed the value of the secular services provided by the parochial schools. To put it another way, as long as the government receives secular value for its money, there is no expenditure of tax funds for religious purposes and thus no meaningful danger to religious liberty. I think a growing number of Justices are somewhat sympathetic to that view. In *Lemon*, there was only Justice White. Now, I believe, there are also Chief Justice Rehnquist and Justice O'Connor (and probably Justice Scalia as well). At present, Justice Powell continues to hold to his distinction between aid to the parents and aid to the schools.

Finally, under my view the unanimous decision in *Witters* should have come out the other way. The state's money was plainly being spent for religious purposes: Washington was not receiving secular value for its grant because the recipient was studying to be a pastor, a missionary, or a religious youth director. Similarly, I would have greater difficulty than the Court in upholding vouchers for parochial school tuition, at least if they provide substantial amounts of money. While parochial schools do afford significant secular educational benefits to students, church related schools also provide at least some significant amount of religious education. If the government, whether through a voucher or a direct grant to parochial schools, is financing not only the value of secular education in those schools, but also all or part of the cost of religious education, this is an expenditure of compulsorily raised tax funds for religious purposes and should be held to violate the establishment clause.³³

32. Choper, *supra* note 1, at 300-04.

33. *See id.* at 315-18.