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Constitutional Law - First Amendment - Tax Deduction for Parents Sending their Children to Parochia! Schools Does Not Violate the Establishment Clause - Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978)

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CONSTITUTIONAL LAW—First Amendment—TAX DEDUCTION FOR PARENTS SENDING THEIR CHILDREN TO PAROCHIAL SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE—*Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978).

> *Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .*[1]

The establishment clause is the first of the two first amendment religion clauses. The simplicity of its expression belies the difficulty encountered in its interpretation.[2] During the last thirty years the Court has labored to formulate principles and guidelines to determine the constitutionality of legislation challenged under the establishment clause.[3] Although the Supreme Court has stated that little further refinement of these principles is needed,[4] the Court may again find it necessary to address the issue of the permissibility of state financial assistance to the parents of children attending sectarian schools.[5] Recently, in *Minnesota Civil Liberties Union v. Roemer*[6]

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1. U.S. CONST. amend. I.

2. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (a challenge to tax exemptions for churches), in which the Court stated, "[t]he Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution."

3. In Everson v. Board of Educ., 330 U.S. 1 (1947), the Supreme Court held that a school district could reimburse private school parents for the costs of transporting their children to school. Both public and nonpublic parents benefited from the aid. In *Everson*, the Supreme Court defined the establishment clause for the first time:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

Id. at 15-16.

4. As Justice Blackmun stated, when delivering the Court's opinion in Roemer v. Board of Pub. Works, 426 U.S. 736 (1976): "So the slate we write on is anything but clean. Instead, there is a little room for further refinement of the principles governing public aid to church-affiliated private schools." *Id.* at 754.

5. In addition to those cases in which the Court has considered the constitutionality of state statutes providing financial aid to private schools (*see* note 39 and accompanying text *infra*), the Court has heard a number of cases involving establishment clause attacks involving religious activities in the public schools. The Court has not looked favorably upon state sponsored religious practices in the public schools. In Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963), a Baltimore school district rule provided for Bible reading at the beginning of each school day. The Court held that such a religious practice was unconstitutional. In its opinion the Court noted, however, that the objective study of the Bible or of religion as part of the secular curriculum was not prohibited by the Constitution. *Id.* at 225. Similarly, a required morning recitation of prayer in the schools of New Hyde Park, New York, was held unconstitutional in Engle v. Vitale, 370 U.S. 421 (1962).

The Court has ruled on programs releasing students from public schools for religious instruction with differing results. In McCollum v. Board of Educ., 333 U.S. 203 (1948), public school

(M.C.L.U.), a three judge district court[7] held, with one dissent, that the establishment clause did not bar Minnesota from allowing a state income tax deduction for tuition, transportation, textbook, instructional materials, and equipment expenses incurred by parents whose children were enrolled in private schools.[8]

This Note will discuss the principles and guidelines developed by the Supreme Court in its analyses of state school aid cases. It will analyze the reasoning in *M.C.L.U.* and will demonstrate the inconsistency of that reasoning with current Supreme Court doctrine. Additionally, it will discuss state and national implications of the *M.C.L.U.* decision.

THE FACTS

In 1971, the Minnesota legislature enacted a statute providing a state income tax credit for the parents and legal guardians of children attending nonpublic elementary and secondary schools.[9] That statute was declared unconstitutional by the Minnesota Supreme Court in 1974 because it had the primary effect of advancing religion.[10] Subsequently, in 1976, the legislature amended a 1955 statute allowing a state income tax deduction of up to $200 to parents of students attending either public or nonpublic schools.[11] The deduction under the original statute covered costs that parents incurred

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students received religious instruction from religious teachers who came into the public schools. The Court held the practice unconstitutional. It was troubled by the use of public school buildings for religious instruction and by the use of the state's compulsory attendance machinery to aid in the provision of pupils. *Id.* at 212.

Four years later, however, in Zorach v. Clauson, 343 U.S. 306 (1952), the Supreme Court held constitutional a New York City program permitting public schools to release students during the school day to receive religious instruction given off school grounds. The Court's opinion stated that "[w]hen the state encourages religious instruction or cooperation with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313-14.

In Epperson v. Arkansas, 393 U.S. 97 (1968), the Court struck down a state law prohibiting the teaching of evolution. The Court held the purpose of the law was to suppress the teaching of evolution because it conflicted with the Biblical view of creation. *Id.* at 107. Such a purpose was sectarian and violative of the establishment clause. *Id.* at 109.

6. 452 F. Supp. 1316 (D. Minn. 1978).

7. Pursuant to 28 U.S.C. § 1253 (1976), a direct appeal can be made to the Supreme Court from three-judge district courts.

8. The 1976 Amendment also required that eligible schools meet Minnesota state requirements and be in compliance with the Civil Rights Act of 1964. Compliance with the Civil Rights Act was probably required in response to Norwood v. Harrison, 413 U.S. 455 (1973). In *Norwood*, the Supreme Court held that it was unconstitutional for a state to loan textbooks to students attending racially discriminatory private schools.

9. MINN. STAT. ANN. § 290.086 (West Supp. 1978).

10. Minnesota Civil Liberties Union v. State, 224 N.W.2d 344 (Minn. 1974), *cert. denied*, 421 U.S. 988 (1975).

11. Enacted as 1955 Minn. Laws, ch. 741, the provision reads:

> The following deductions from gross income shall be allowed in computing net income:
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> . . . .

for the transportation and tuition of their dependents enrolled in elementary and secondary schools.[12] The amended statute raised the deduction ceiling to $500 for each dependent in kindergarten through sixth grade, and to $700 for each dependent in seventh through twelfth grade.[13] Under this amendment, deductible expenditures were expanded to include the costs of secular textbooks, instructional materials, and equipment.[14]

The 1976 amendment prompted a challenge to the law on establishment clause grounds by the Minnesota Civil Liberties Union, Americans United for Separation of Church and State, and seven Minnesota taxpayers.[15] Plaintiffs limited their challenge to whether the deduction allowed sectarian school parents for tuition, instructional materials, and equipment had the impermissible effect of advancing religion.[16] Finding that the statute did not have such an impermissible effect, the district court held it constitutional.[17]

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(19) The amount he has paid to others for tuition of each dependent and the cost of transportation of each dependent in attending an elementary or secondary school; provided that the deduction for each dependent shall not exceed $200.

12. *Id.*

13. MINN. STAT. ANN. § 290.09, Subd. 22 (West Supp. 1978), reads:

The following deductions from gross income shall be allowed in computing net income. . . . Subd. 22. 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 Minnesota Statutes, Chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.

14. *Id.*

15. In Frothingham v. Mellon, 262 U.S. 447 (1923), the Supreme Court ruled that a federal taxpayer did not have a sufficient interest in federal spending to challenge the disbursement of monies. However, *Frothingham* was limited by Flast v. Cohen, 392 U.S. 83 (1968). In *Flast*, an establishment clause challenge to the constitutionality of Titles I and II of the Elementary and Secondary Education Act of 1965, standing was granted to federal taxpayers. To have standing, two requirements had to be met. First, the challenge must be made only to an exercise of Congressional power under the taxing and spending clause of article I, § 8 of the Constitution. Secondly, the taxpayer must demonstrate that in enacting the legislation Congress exceeded a constitutional limitation on its article I, § 8 power, not that it was without any power to so legislate. *Id.* at 102-3. For a more detailed discussion of the importance of *Frothingham* and *Flast, see* R. MORGAN, THE SUPREME COURT AND RELIGION (1974).

16. 452 F. Supp. at 1318. The original statute was unchallenged. However, in testimony before the Minnesota Senate Taxes and Tax Laws Committee, a spokesperson for Americans United for Separation of Church and State and the Minnesota Civil Liberties Union (M.C.L.U.) stated that should the deduction ceiling be increased, a constitutional challenge might ensue. Tape of Taxes and Tax Laws Committee Meeting, April 14, 1975 (7:00 PM).

NEUTRALITY: THE GOVERNING PRINCIPLE OF THE ESTABLISHMENT CLAUSE

The establishment clause requires the federal and state governments to be neutral in their dealings with religion and religious institutions.[18] Neutrality does not, however, require a total separation of church and state.[19] The state can pay clerics and contract with a religious order for the performance of secular activities.[20] General welfare programs, such as police or fire protection, can incidentally benefit religious institutions.[21] Thus, the state's interest in education allows it to provide transportation[22] and secular textbooks[23] to children even though they may attend a sectarian school. Neutrality does require, however, that the state not sponsor or promote religion.[24]

In oral arguments, plaintiffs apparently conceded that if a state could directly provide transportation and textbooks for parochial school children, it could indirectly subsidize these items through a tax deduction. Although superficially reasonable, this conclusion overlooks the guiding principle of neutrality in state aid cases. In those instances where the Supreme Court has allowed direct aid to the parents of, poor children attending parochial schools, public school children or their parents also benefited. Most importantly, there has been no distinction in the method of providing the benefit to private or public school beneficiaries. Thus, the district court erred in assuming "that a statutory deduction for parental expenditures to purchase these items is constitutionally proper." 452 F. Supp. at 1318. *See* note 44 *infra*.

17. 452 F. Supp. at 1322.

18. Everson v. Board of Educ., 330 U.S. 1, 18 (1947). Neutrality has been a concern of the Court in all the various types of establishment clause cases which have come before it. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973); Tilton v. Richardson, 403 U.S. 672, 677 (1971); Abington Township School Dist. v. Schempp, 374 U.S. 203, 222 (1963); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

19. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

20. The state can pay clergymen elected to legislatures any salary or remuneration paid other legislators. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 746 n.13 (1976).

In Bradfield v. Roberts, 175 U.S. 291 (1899), the Commissioners of the District of Columbia had contracted with a religious order of nuns to build an addition to their hospital, provided two-thirds of the capacity of the addition would be reserved for poor patients sent there by the Commissioners. The Court held that payment of the funds by the treasury department to fulfill the contract was not a violation of the establishment clause.

21. Board of Educ. v. Allen, 392 U.S. 236, 242 (1968).

22. Everson v. Board of Educ., 330 U.S. 1 (1947). For a more detailed discussion of *Everson, see* note 3 and accompanying text *supra*.

23. Board of Educ. v. Allen, 392 U.S. 236 (1968). In *Allen* the Supreme Court upheld a New York program requiring local school districts to lend textbooks to all secondary school students, including those attending sectarian schools. *Allen*, however, was not the first case to come before the Court challenging state provision of textbooks to private school children. In Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930), a state program providing free textbooks for all school children was challenged as a deprivation of property for a private purpose, violating the fourteenth amendment. The Court stated that the state had a legitimate public purpose, the education of its children, in utilizing its taxing powers to supply the textbooks. Hence, the statute was constitutional. *Id.* at 375.

24. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947). In formulating its neutrality principle, the Court has recognized that the roots of the establishment clause lie in pre-Constitutional history. The Court has been cognizant of the sensitivity of the Founding Fathers toward the

The Supreme Court has formulated a tripartite test to determine whether challenged legislation meets this neutrality standard. To pass Constitutional muster under the establishment clause, legislation must first have a secular legislative purpose.[25] Second, its principle or primary effect must neither advance nor impede religion.[26] Third, it must avoid excessive governmental entanglement with religion.[27] The *M.C.L.U.* court acknowledged this

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abuses engendered by governmental establishment of religion, both in Europe and in colonial America, particularly "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

In 1785-86, James Madison and Thomas Jefferson led the fight against renewal of Virginia's tax levy to support Christian teachers. To attract support, Madison wrote his *Memorial and Remonstrance against Religious Assessments*. The tax levy was ultimately defeated. Everson v. Bd. of Educ., 330 U.S. 12 (1947). The *Everson* Court stated that "[t]his Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute." *Id.* at 13.

A somewhat different interpretation of the establishment clause has been suggested in W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963), in light of the fact that at the time of the drafting of the first amendment, a number of states had established churches. Katz argues that the first amendment was meant not only to prohibit Congress from establishing religion, but to prevent Congress from disestablishing any state religions as well. *Id.* at 7-10.

25. Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963). Although secular legislative purpose is required of any legislation challenged under the establishment clause, it has not proved instrumental in striking down legislation involving state aid to private sectarian schools. The Court has accepted a variety of legislative purposes as valid, even those relating to legislation it has ultimately found impermissible. Furtherance of the educational opportunities of young people has been cited in a number of cases as the secular purpose of the legislation. Meek v. Pittenger, 421 U.S. 349 (1975); Hunt v. McNair, 413 U.S. 734 (1973); Norwood v. Harrison, 413 U.S. 455 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968). Enhancement of the quality of education was cited in Lemon v. Kurtzman, 403 U.S. 602 (1971). Wolman v. Walter, 433 U.S. 229 (1977), gave the provision of health and educational opportunities as the purpose of the legislation before it. Reducing the costs of public education was the legislative purpose in Sloan v. Lemon, 413 U.S. 825 (1973). Health and safety concerns were the factors behind the challenged legislation in Everson v. Board of Educ., 330 U.S. 1 (1947).

26. *Id.* Under the primary effect test, a law which has the primary effect of promoting a legitimate secular purpose can still be found unconstitutional if it also has the direct and immediate effect of advancing religion. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). In Tilton v. Richardson, 403 U.S. 672 (1971), the Court upheld federal construction grants to sectarian colleges, but struck down a provision which might allow the structures to be used for secular purposes twenty years later. That provision was found unconstitutional because it might "in part have the effect of advancing religion." 403 U.S. at 683. For extensive discussion of the primary effect test, *see* notes 33-52 and accompanying text *infra*.

27. Lemon v. Kurtzman, 403 U.S. 602 (1971). The third inquiry made by the Court in an establishment clause challenge, is the degree of entanglement the legislation will cause between the government and religion or religious institutions. Entanglement can be either administrative or political.

Administrative entanglement results from excessively frequent governmental contacts with, or surveillance of religion or religious institutions. Walz v. Tax Comm'n, 397 U.S. 664 (1970). Political entanglement results from controversial legislation which might cause divisions be-

three-prong test as the established guideline to be applied.[28] Although plaintiffs in their oral argument had conceded that the Minnesota statute satisfied the first and third tests,[29] they argued that the Minnesota statute had the impermissible effect of advancing religion.[30] Consequently, the district court limited its analysis to the primary effect issue.[31]

ASSESSING THE PRIMARY EFFECT: THE SUPREME COURT'S ANALYSIS

In undertaking its primary effect analysis in cases involving state aid to private schools, the Supreme Court has not focused on the permissibility of the form of the aid provided by the challenged legislation.[32] In fact, it has specifically stated that the form of the aid is not controlling in these cases.[33] Rather, the Court has based its primary effect analysis on a consideration of the propriety of two factors: the nature of the beneficiary aided and the employment of the aid.[34]

One category of beneficiary considered by the Court has been the sectarian institution. The Court has specifically stated that no aid may be pro-

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tween citizens along religious lines. Lemon v. Kurtzman, 403 U.S. 602 (1971). For criticism of the entanglement test as an invalid distortion of the intent of the drafters of the Bill of Rights, *see* Weber, *School Aid and Political Divisions*, 38 JURIST 203 (1978).

28. 452 F. Supp. at 1318.

29. *Id.* *See* discussion in note 16 *supra*.

30. *Id.*

31. *Id.*

32. *See* note 24 *infra*.

33. Roemer v. Board of Pub. Works, 426 U.S. 736, 766 (1976). Additionally, the Court stated that its decisions in school aid cases are better reconciled "in terms of the character of the aided institution." *Id.* It is no wonder that the *M.C.L.U.* court lamented that "there appears to be no discernible consistency in the decisions of the [Supreme] Court in Establishment Clause challenges to state school aid." 452 F. Supp. at 1320. Some commentators have agreed with *M.C.L.U.* that the Court has been inconsistent in its interpretation of the establishment clause. For a discussion suggesting that the inconsistency has resulted in the preeminence of disestablishment values over free exercise values, *see* Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207 (1978).

34. The Supreme Court has never specifically articulated that the primary effect test should apply this two factor analysis. However, such a conclusion is inferred from the Court's characterization of aid having the primary effect of advancing religion.

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an *institution* in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a *specifically religious activity* in an otherwise substantially secular setting.

Hunt v. McNair, 413 U.S. 734, 743 (1973) (emphasis added). To compare challenged legislation with the *Hunt* characterization would necessitate focusing on the institution aided and the employment of the aid. For an example of the Court's application of the process, *see* Roemer v. Board of Pub. Works, 426 U.S. 736, 755-59 (1976) (discussed in note 41 *infra*). Additionally, the Court has discussed the importance of each factor individually in its cases. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366 (1975) (nature of the institution); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973) (employment of the aid).

vided to a pervasively sectarian institution whose religious mission permeates all of its activities.[35] Thus, the Supreme Court has held unconstitutional a state law authorizing the loan of instructional materials and equipment to religion-pervasive elementary and secondary schools.[36] The Supreme Court concluded that the massive aid provided to the educational function of these schools unavoidably aided their religious mission as well.[37] In

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35. Hunt v. McNair, 413 U.S. 734, 743 (1973).

36. Meek v. Pittenger, 421 U.S. 349 (1975). A better understanding of the characteristics of a pervasively sectarian institution can be gained by reading the allegations filed in the complaint at the district court level in *Meek*. These allegations were included in the Supreme Court's opinion. The complaint alleged that the aided schools:

> (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curricula and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

Id. at 356 (quotation marks omitted).

In *M.C.L.U.* some parents claiming the educational deductions sent their children to schools having similar characteristics. The Stipulation of Facts asserted that some of these schools:

> A. Have as one of their primary purposes the teaching, propagation or promotion of a particular religious faith;
> B. Conduct the sectarian portion of their operations, curricula and programs to fulfill that purpose;
> C. Require attendance at courses in religious doctrine or religious worship services for those pupils of the same faith as that of the sponsoring church or organization;
> D. Are an integral part of the religious missions of the sponsoring churches or religious organizations;
> E. Contain religious symbols evident to students who attend said schools;
> F. Direct their teachers to limit certain subjects to be within the tenets of the particular religion.

Stipulation of Facts 8 (A-F) at 3-4.

37. 421 U.S. at 365. In Board of Educ. v. Allen, 392 U.S. 236 (1968), the Court spoke of the twin goals of religious schools: religious and secular education. The Court could not assume, based on the record before it in *Allen*, that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished . . . by the public are in fact instrumental in the teaching of religion." *Id.* at 248.

However, in later cases the Court referred to the "substantial religious character of these church-related schools," Lemon v. Kurtzman, 403 U.S. 602, 616 (1971), and the likelihood that in religious primary and secondary schools "religion [would] permeate the area of secular education," Tilton v. Richardson, 403 U.S. 672, 687 (1971). The doctrinal tension caused between *Allen* and later cases has caused at least one Justice to question *Allen*'s present validity. *See* Wolman v. Walter, 433 U.S. 229, 257 (1977) (Marshall, J., concurring in part and dissenting in part).

Although the Court's characterization of sectarian elementary and secondary schools has varied at times, it has never held constitutional attempts by states to provide aid directly to sectarian elementary and secondary schools. *See* Meek v. Pittenger, 421 U.S. 349 (1975) (the loan of instructional material and equipment); Levitt v. Committee for Pub. Educ. and Religious Lib-

contrast, the Court has not considered sectarian colleges and universities pervasively sectarian.[38] For example, statutes providing direct grants to religiously affiliated colleges and universities have been upheld by the Court.[39]

A second category of beneficiary considered by the Supreme Court has been sectarian school children[40] or their parents.[41] The Court has em-

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erty, 413 U.S. 472 (1973) (reimbursement for state mandated testing utilizing teacher developed tests); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (grants for the maintenance and repair of school facilities and equipment); Lemon v. Kurtzman, 403 U.S. 602 (1971) (partial reimbursement of the costs of teachers' salaries paid to the schools and partial payment of teachers' salaries paid directly to the teachers). The Court held the above provisions unconstitutional for having the primary effect of advancing religion (*Levitt, Nyquist*), or for involving an excessive governmental entanglement with religion (*Lemon*), or both (*Meek*).

38. The Court has upheld direct grants to sectarian universities because it has felt that there are significant differences between church-related colleges and universities, and sectarian elementary and secondary schools. In making this distinction, the Court has noted that the "skepticism of the college student" would serve as a barrier to religious indoctrination. Tilton v. Richardson, 403 U.S. 672, 686 (1971). Additionally, the academic freedom present in church-related colleges and universities would ensure an atmosphere of free inquiry. *Id.* However, the Court has intimated that direct aid given to a college or university found to be pervasively sectarian could be held unconstitutional. *Id.* at 682.

39. In Tilton v. Richardson, 403 U.S. 672 (1971), the Supreme Court upheld construction grants to church-related colleges and universities. In Roemer v. Board of Pub. Works, 426 U.S. 736 (1976), the Court upheld a state statute authorizing noncategorical grants to any private college or university, excluding those only awarding seminarian or theological degrees. The money could only be used by the schools for secular purposes.

40. Utilizing the theory that the child, and not the institution he or she attended, was the true beneficiary of the aid, several states have successfully provided aid to their parochial school students. *See* Wolman v. Walter, 433 U.S. 229 (1977) (free textbook loan, standardized testing, health services given on private school grounds, and remedial services given off the private school grounds, permissible); Board of Educ. v. Allen, 392 U.S. 236 (1968) (free textbook loan); Everson v. Allen, 330 U.S. 1 (1947) (transportation). In each of the above cases the wording of the statute specifically authorized the child as the recipient of the aid, and not the parochial school.

Merely designating the child as the recipient of the statute's aid has not guaranteed a finding of constitutionality. In *Wolman*, in addition to the aid cited above, Ohio authorized the expenditure of funds for field trips for nonpublic school students. The Court found, however, that as the nonpublic schools, and not their students, controlled all aspects of planning and implementing the trips, the schools were the true recipients of the aid. Wolman v. Walter, 433 U.S. 229, 253 (1977). Having made that determination the Court held the aid unconstitutional as there could be no guarantee that the teacher would not incorporate sectarian views into the experience without excessive governmental surveillance. *Id.* at 254.

In Meek v. Pittenger, 421 U.S. 349 (1975), the Supreme Court held that the provision of remedial services to parochial school students in the parochial school facilities was impermissible. Again, the Court stated that ensuring that the remedial teachers confined their instruction to the secular would require excessive governmental surveillance. *Id.* at 370. Thus, in both instances the aid provided was unconstitutional because the excessive governmental surveillance needed to ensure its secularity would result in an impermissible entanglement of government and religion.

41. Attempts at providing aid to the parents of parochial school children have not fared as successfully as measures providing aid to their children. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (tuition reimbursement and tax benefits to private school parents, unconstitutional). For a more extensive discussion of *Nyquist*, *see* notes 46-49 and accompanying text *infra*.

phasized that they may only benefit from state aid statutes commonly aiding all students or all parents.[42] Additionally, the Court has stated in dicta that the provision of aid which acts to reward parents for sending their children to religious schools is impermissible.[43]

In addition to analyzing the beneficiaries of state aid measures, the Court has carefully scrutinized the employment of the aid provided. Two Supreme Court cases particularly stress the importance the Court has placed on an analysis of this factor. In *Committee for Public Education and Religious Liberty v. Nyquist*,[44] a New York statute provided for direct maintenance and repair grants to private schools. Additionally, it allowed private school parents either a partial tuition reimbursement or a tax credit for tuition paid.[45] The Court noted that maintenance and repair grants and unrestricted tuition benefits could encompass both secular and sectarian activities.[46] As the stat-

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Similarly, the Court invalidated a Pennsylvania attempt at parental reimbursement. On June 28, 1971, the Supreme Court handed down its decision in Lemon v. Kurtzman, 403 U.S. 602 (1971), invalidating a Pennsylvania law allowing the state to partially reimburse parochial schools for the salaries of their teachers. On August 27, 1971, the Pennsylvania General Assembly enacted a new law providing funds to partially reimburse parents for the tuition costs of their children attending private schools. Sloan v. Lemon, 413 U.S. 825, 826 (1973). Dismissing the State's argument that the aid primarily benefited parents and only incidentally benefited private schools, the Court held the act unconstitutional. The Court stated the Pennsylvania law was constitutionally indistinguishable from *Nyquist* and thus had the primary effect of advancing religion. *Id.* at 828.

42. The Court has emphasized that sectarian school students and their parents may only benefit from state aid statutes commonly aiding all students or all parents: "Bus transportation, school lunches, public health services, and secular textbooks supplied *in common to all students* [are] not thought to offend the Establishment Clause." Lemon v. Kurtzman, 403 U.S. 602, 616-17 (1971) (emphasis added). In Meek v. Pittenger, 421 U.S. 349, 362 n.12 (1975), the Court approvingly discussed the lower court decision of Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974). The Supreme Court noted that in *Marburger* the district court invalidated a New Jersey law allowing parents of nonpublic school children to be reimbursed for the money they spent to purchase their children's secular textbooks. Public school students were only loaned textbooks, however. Thus, the reimbursement program afforded a benefit to nonpublic school parents not extended to public school parents. 421 U.S. at 362 n.12. For lower court rulings holding that a distinction in the method of providing benefits to public and parochial school children or their parents is unconstitutional, *see* Members of Jamestown School Comm. v. Schmidt, 427 F. Supp. 1338 (D. R.I. 1977); Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955 (S.D. Iowa 1975); Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

43. Sloan v. Lemon, 413 U.S. 825, 832 (1973); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 793 (1973).

44. 413 U.S. 756 (1973).

45. Under the tuition reimbursement provision only parents with an annual income of less than $5,000 were eligible for reimbursement. Reimbursement was limited to $50 for each grade school child and $100 for each high school child. In any event, the amount received could not exceed 50% of the tuition paid. *Id.* at 764.

The tuition credit plan allowed parents with an adjusted gross income of less than $25,000 to subtract from that income an amount specified on a pre-determined table. The amount given on the table bore no relationship, necessarily, to the amount of tuition paid, but rather was dependent on the parents' gross income. *Id.* at 765-66.

46. *Id.* at 774-75, 780.

ute did not limit the aid to secular activities, the Court held it unconstitutional.[47] Relying on *Nyquist*, the Court in *Wolman v. Walter*[48] invalidated the loan of instructional materials and equipment to children attending sectarian schools because their use could not be restricted to secular activities.[49] However, the Court has allowed bus transportation, school lunches, public health services, and secular textbooks to be supplied to private school children due to the secular nature of these items.[50]

Thus, the primary effect test requires that any school aid provided by the state must benefit only non-pervasively sectarian institutions or commonly benefit public and nonpublic school children or their parents. Additionally, aid provided to these acceptable categories of beneficiaries must be employed in secular activities only and must be incapable of diversion to sectarian purposes. As *Nyquist* illustrated, statutes not conforming to either of these guidelines have been held unconstitutional by the Supreme Court for having the impermissible effect of advancing religion.

THE DISTRICT COURT'S PRIMARY EFFECT ANALYSIS

The district court in *M.C.L.U.* framed its primary effect analysis in terms of the beneficiary aided and the form of the aid provided by the Minnesota statute.[51] The court, however, gave little scrutiny to the beneficiaries aided by the statute, noting that both public and non public school parents making eligible expenditures could claim the deduction.[52] The court recognized, however, that a statute benefitting both public and nonpublic school parents could be unconstitutional if it aided religious activities.[53] In its opinion the court stated that it was unclear whether the Minnesota statute aided religious activities.[54] Therefore, the court turned its attention to the form of the aid provided. The court concluded that the permissibility of the statute rested on whether the deduction mechanism advanced the religious function of affected sectarian schools.[55]

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47. *Id.* at 774, 794, 798.

48. 433 U.S. 229 (1977).

49. *Id.* at 250-51. In *Wolman* the Court admitted that tension existed between the results reached in *Wolman* and *Allen*. It seemed unlikely that the secular use of textbooks could be any more guaranteed than the secular use of instructional materials or equipment. The Court noted, however, that a presumption of secularity had been extended to textbooks provided private school children if the books were limited to those provided public schools. *Id.* at 215 n.18. Furthermore, the Court refused to again extend that presumption stating that "[w]hen faced . . . with a choice between extension of the unique presumption created in Allen [sic] and continued adherence to the principles announced in our subsequent cases, we choose the latter course." *Id.*

50. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

51. For a discussion of the little weight the Supreme Court has accorded the form of the aid provided by the state, *see* note 34 and accompanying text *supra*.

52. 452 F. Supp. at 1320.

53. *Id.*

54. *Id.*

55. *Id.*

Because the district court narrowed its inquiry to the permissibility of the form of aid provided, it principally limited its review to cases involving establishment clause attacks on tax statutes benefitting religion or religious institutions. It noted that the Supreme Court had never ruled on the constitutionality of charitable deductions for religious purposes.[56] However, the Court in *Walz v. Tax Commission*[57] had ruled that a statute granting a tax exemption for property used for religious purposes was constitutional, as it provided only incidental aid to religion.[58] This differed from the Court's ruling in *Nyquist* that tuition tax credits for parochial school parents were unconstitutional.[59] The *M.C.L.U.* court reconciled these rulings by concluding that tax credits aiding a sectarian function were forbidden, while tax exemptions aiding a sectarian function were not.[60] Hence, the Court reasoned that the constitutionality of the Minnesota statute turned on whether tax deduction aid should be categorized with the permissible aid provided by tax exemptions or the impermissible aid provided by tax credits.[61]

In its consideration of this issue, the court turned to *Kosydar v. Wolman*,[62] a three judge district court decision. *Kosydar* held an Ohio tax credit plan for nonpublic school parents unconstitutional.[63] In dictum, the *Kosydar* court commented that tax credits were a more direct form of aid than tax deductions.[64] Elaborating on this point, the *M.C.L.U.* court noted that parochial school parents would not as automatically benefit from the availability of a tax deduction as they would from a tax credit provision.[65] A benefit would accrue only if the parents made eligible deductions, itemized deductions, had a

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56. *Id.*

57. 397 U.S. 664 (1970).

58. 452 F. Supp. at 1321.

59. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 794, 798 (1973).

60. 452 F. Supp. at 1321. The district court's conclusion that tax exemptions aiding a *sectarian function* are permissible is contradictory to the Supreme Court's admonition that only secular activities can be aided by the state. Hunt v. McNair, 413 U.S. 734, 747 (1973). *See* notes 46-50 and accompanying text *supra*.

61. 452 F. Supp. at 1321.

62. 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd mem., sub nom.*, Grit v. Wolman, 413 U.S. 901 (1973).

63. *Id.* at 762.

64. *Id.* at 763. The *Kosydar* court felt credits were a more direct form of aid than deductions because credits reduced the tax paid to the state, while deductions only reduced the taxable income. *Id.* Thus, a taxpayer would definitely benefit from a credit. A tax deduction would only be beneficial if the taxpayer was placed in a lower tax bracket. This argument was successfully made by defendants in *M.C.L.U.* *See* note 68 and accompanying text *infra*. However, it should be noted that even though a tax deduction would not necessarily place a taxpayer in a lower tax bracket, the taxpayer's taxable income base would nevertheless be reduced. Thus, the argument could be made that any tax deduction would directly benefit a taxpayer who claimed it.

65. 452 F. Supp. at 1322.

taxable income after deductions, and the deduction placed them in a lower tax bracket.[66] A tax credit provision, however, would allow parents to subtract a predetermined amount directly from their tax bill.[67] Thus, the court concluded that the Minnesota deduction was a much less direct form of aid than the *Nyquist* credit scheme.[68] Being an indirect form of aid, the deduction, like the tax exemption, only incidentally benefitted religion, and was therefore constitutional.[69]

To further support its conclusion, the *M.C.L.U.* court enumerated two non-economic reasons for distinguishing *Nyquist* and relying on *Walz*. First, the statute in *Walz* did not limit exemptions to property used for religious purposes but was directed to a broad spectrum of charitable, educational, and religious purposes.[70] In *Nyquist*, however, only parents of nonpublic school children were eligible for the tax benefits.[71] The court reasoned that the breadth of the benefitted class in *M.C.L.U.* was similar to the breadth of the class benefitted in *Walz*,[72] since the Minnesota statute allowed the deduction to parents of children in both public and private schools.

Secondly, in both *Walz* and *Nyquist* the Supreme Court had referred to the long historical acceptance accorded a tax exemption for property used for religious purposes as a factor suggesting its constitutionality.[73] In contrast, the *Nyquist* Court had noted that educational tax credits were of relatively recent vintage.[74] The *M.C.L.U.* court stated that the Minnesota statute should also benefit from the *Walz* historical acceptance rationale,[75] as it had been enacted in 1955, and the deduction it provided was analogous to the historically accepted charitable deduction.[76]

Thus, finding *Walz* controlling, the *M.C.L.U.* court concluded that the Minnesota statute did not have the impermissible effect of advancing religion. It was neutral, neither advancing nor impeding religion; it benefited parents of children attending both public and nonpublic schools; and finally, it had received unchallenged historical acceptance.[77]

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66. *Id.* at 1321.

67. For a discussion of tax credits by the Supreme Court in the context of state aid cases, *see* 413 U.S. at 789.

68. The court specifically stated "that the relationship between the tax relief and the economic benefit to the religious function of the affected sectarian schools is much more remote than was the case with the credit systems invalidated in the previously cited opinions." 452 F. Supp. at 1321-22.

69. 452 F. Supp. at 1322.

70. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

71. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 765 (1973).

72. 452 F. Supp. at 1322.

73. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 792 (1973).

74. *Id.*

75. 452 F. Supp. at 1322.

76. *Id.*

77. *Id.* at 1322.

CRITICISM OF THE DISTRICT COURT'S ANALYSIS

The *M.C.L.U.* court was confused in its application of the Supreme Court's establishment clause doctrine in state aid cases.[78] Finding no consistency in Court precedents, it concluded its only alternative was to choose between the two Supreme Court cases it considered most germane.[79] Thus, a determination of whether *Walz*[80] or *Nyquist*[81] controlled comprised the heart of the court's analysis.[82] Unfortunately, the court's failure to carefully scrutinize the beneficiary aided and the employment of the aid provided by the Minnesota statute led it to conclude incorrectly that *Walz* controlled.

First, the *M.C.L.U.* court should have made a more careful inquiry into the nature of the beneficiaries aided by the Minnesota statute. As previously noted, the district court concluded with little scrutiny that the breadth of the benefitted class in *M.C.L.U.* was similar to the breadth of the benefitted class in *Walz*.[83] However, Judge Alsop in his *M.C.L.U.* dissent pointed out the superficiality of this position.[84] Although the targeted class in *M.C.L.U.* included all parents, few public school parents pay for tuition, transportation, textbooks, instructional materials and equipment.[85] By limiting deductions to expenditures made by few public school parents, the law primarily benefitted parents of private school children.[86] Thus, contrary to the district court's conclusion, the benefitted class in *M.C.L.U.* was similar to that in *Nyquist* and distinguishable from the broad class of beneficiaries in *Walz*.

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78. *Id.* at 1320.

79. *Id.*

80. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

81. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

82. 452 F. Supp. at 1320-22.

83. *Id.* at 1321-22.

84. As Judge Alsop stated in his dissenting opinion:

> The fact that § 290.09(22) applies to taxpayers whose dependents attend public schools is without practical significance. Although a taxpayer may be obligated to pay tuition for a dependent who attends a public school in a school district other than the district in which the student resides, Minn. Stat. § 123.39(5) (1978), the number of taxpayers actually affected by the obligation to pay such tuition is so limited that application of the deduction to such persons broadens the scope of Minn. Stat. § 290.09(22) (1976) only imperceptibly beyond the scope of N.Y. Tax Law § 612 (Supp. 1972-73) [*Nyquist*]. Obviously the tax reductions . . . flow primarily to taxpayers whose dependents attend sectarian nonpublic schools.

Id. at 1323.

Minnesota law presently requires transportation and textbooks be provided to public school children. *See* MINN. STAT. ANN. § 123.39 (West Supp. 1978) and MINN. STAT. ANN. § 124.223 (West Supp. 1978). Additionally, the State provides transportation to private school children on an equal basis to that provided public school children. *See* MINN. STAT. ANN. § 123.78 (West Supp. 1978). Additional aid in the form of textbooks, health services, and instructional materials is also provided private school children. *See* MINN. STAT. ANN. §§ 123.931-123.938 (West Supp. 1978).

85. 452 F. Supp. at 1323.

86. *Id.*

The second serious analytical flaw in the district court's reasoning was its failure to scrutinize the employment of the aid provided by the Minnesota statute. This failure caused the court to misread *Nyquist* and to disregard *Wolman v. Walter*.[87] The court misinterpreted *Nyquist* as prohibiting a particular form of aid—tax credits.[88] As previously pointed out, however, *Nyquist* did not hold the statute unconstitutional because the tax credit mechanism was, in itself, impermissible. Rather, the Court struck down the legislation because the unrestricted aid provided by that mechanism, maintenance grants and tuition relief, could be employed to support religious activities.[89] Because the court did not focus on the employment of the aid, it also failed to accord *Wolman* significant weight. The court limited its discussion of the case to a footnote.[90] Even this cursory review of the decision was distorted since the district court neglected to look beyond the holding in *Wolman* to determine the Supreme Court's reasoning.[91] *Wolman* prohibited the loan of instructional materials and equipment to sectarian school children because their use could not be limited to secular purposes.[92] Thus, the *M.C.L.U.* court disregarded a Supreme Court decision which bore directly on the issue. In the face of a proper *Wolman* interpretation, it would have been very difficult for the district court to have found *Walz* rather than *Nyquist* controlling. The district court then would have been faced with two Supreme Court precedents requiring aid to sectarian schools to be clearly restricted to secular purposes.[93] Analyzing the act before it in light of the restriction requirements of *Nyquist* and *Wolman*,[94] the district court should have held the deduction for tuition, instructional materials, and equipment impermissible.

Clearly the district court's reliance on *Walz* was misplaced. The Supreme Court analyzed *Walz* in terms of the entanglement test.[95] Of primary concern to the Court was the increased governmental involvement with religion which might result if the state taxed churches.[96] The Court noted that historically governments frequently have been hostile toward religion.[97] Granting tax exemptions helped to guard against the dangers inherent in the state's taxing powers.[98] Thus, granting a tax exemption to churches helped to ensure a posture of state neutrality toward religion.[99] Interestingly, in

87. 433 U.S. 229 (1977).
88. 452 F. Supp. at 1320-21.
89. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973).
90. 452 F. Supp. at 1319 n.3.
91. *Id.*
92. Wolman v. Walter, 433 U.S. 229, 250-51 (1977).
93. *See* notes 46-52 and accompanying text *supra*.
94. *Id.*
95. Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).
96. *Id.*
97. *Id.* at 673.
98. *Id.*
99. *Id.* at 675.

Nyquist,[100] as in *M.C.L.U.*,[101] proponents of the challenged statutes relied heavily on *Walz* to support the permissibility of the tax relief measures. The *Nyquist* Court, however, rejected *Walz* as controlling, stating that special tax benefits for private school parents were inconsistent with neutrality.[102] Additionally, it noted that the granting of tax benefits to parents of private school children gave rise to increased governmental entanglement with religion.[103]

Finally, the court's reliance on the *Walz* historical acceptance rationale to uphold the Minnesota statute was inappropriate. The nature of a true charitable deduction and that of the Minnesota educational expenses deduction are significantly different. Federal courts,[104] interpreting the federal income tax laws, and the Minnesota Supreme Court,[105] interpreting state tax laws, have required that a charitable deduction be a voluntary contribution given with no expectation of returned services. Therefore, a tax deduction covering expenditures made for the education of one's children would not fall within the parameters of a charitable deduction as defined by these courts.

Although the district court lamented that the Supreme Court's establishment clause decisions are inconsistent,[106] consistency can be found in the Court's application of a primary effect analysis. The nature of the beneficiary aided and the employment of the aid are two factors critical to a proper reading of Supreme Court precedents applying the primary effect test. Had the district court's analysis been predicated on these factors, rather than on the form of the aid provided, it would have been doctrinally sound and less subject to error. Clearly, had the proper analysis been applied, the district court would have found the Minnesota statute unconstitutional for having the primary effect of advancing religion.

IMPACT

Plaintiffs in *M.C.L.U.* chose not to appeal the court's ruling.[107] Thus, Minnesota is now able to provide tax relief to the parents of its private school children[108] despite its previously unsuccessful attempt to do so.[109]

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100. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 791 (1973).

101. 452 F. Supp. at 1320.

102. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 793 (1973).

103. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 797 (1973).

104. Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972); DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962).

105. *See* Gotlieb v. Comm'r of Taxation, 245 N.W.2d 244 (Minn. 1976). For a discussion of *Gotlieb*, *see* Note, *Taxation: Liberal Standard Proposed for Deducting Charitable Contributions to Religious Schools*, 61 MINN. L. REV. 887 (1977).

106. 452 F. Supp. at 1320.

107. Minneapolis Tribune, Aug. 10, 1978, § B (State News) at 2.

108. The challenged statute in *M.C.L.U.* represented Minnesota's second attempt to provide tax relief to the parents of its private school children. For a discussion of the first, *see* note 9 and accompanying text *supra*.

109. *See* note 10 and accompanying text *supra*.

On a national scale, advocates of tax relief measures for private school parents will no doubt herald this decision, particularly because in rendering it, the district court distinguished *Nyquist*. Presumably, the Supreme Court's *Nyquist* decision had tolled the death knell for tax relief measures of this nature.[110] Numerous state tax credit provisions[111] and one state tax deduction provision[112] had been struck down in its wake. By distinguishing *Nyquist*, however, the *M.C.L.U.* decision could provide renewed impetus to efforts to pass comparable tax measures in other states.[113] Therefore, although the Supreme Court has stated that the establishment clause principles in state aid cases have been fully articulated,[114] the *M.C.L.U.* holding indicates that in the future the Court may need to decide the permissibility of this type of tax deduction provision.

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110. For a discussion of *Nyquist's* effect on state aid to sectarian schools, *see* Piekarski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247 (1975).

111. A California plan was invalidated by summary affirmance in Franchise Tax Bd. v. United Americans for Pub. Schools, 419 U.S. 890 (1974) (not reported below). An Ohio plan was invalidated in Grit v. Wolman, 413 U.S. 901 (1973), *aff'g* Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972). For the Minnesota Supreme Court case invalidating that state's credit plan, *see* notes 9 and 10 and accompanying text *supra*.

112. Public Funds for Pub. Schools v. Byrne, 590 F.2d 514, *aff'd without opinion*, 47 U.S.L.W. 3769 (1979).

113. Attempts to aid parents of children attending private elementary and secondary schools have occurred at the national as well as the state level. Legislation providing tax credits for private school parents was introduced into the 95th Congress. Originally the aid was to be provided only to private school parents. However, an amendment adopted by the House Ways and Means Committee made public school parents eligible for the deduction. Upon reconsideration, the amendment was defeated. Some members were concerned that a federal tuition subsidy would encourage states to charge tuition for their public schools. Should that occur, the face of American free public school education would be radically altered. *Tax Break Approved for College Costs Only*, 1978 CONG. Q. 903.

114. *See* note 4 and accompanying text *supra*.