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Public Schools, Public Fora, and State Aid to Religious Education

CHARLES VAN COTT*

In *Mueller v. Allen*,¹ the United States Supreme Court upheld a Minnesota tax deduction for educational expenses over claims that the deduction violated the establishment clause² by providing financial assistance to sectarian schools. *Mueller* marks a partial retreat from previous Supreme Court establishment clause precedents.³ But the fairly simple argument advanced therein that “a program . . . that

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1. 103 S. Ct. 3062 (1983).

2. The religion clauses of the first amendment provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

3. The Court invalidated a similar scheme a decade earlier in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). *Nyquist* involved a New York program which allowed tuition reimbursement and tax deductions for low income parents whose children attended nonpublic schools. The majority in *Mueller* distinguished *Nyquist* by pointing out that the Minnesota scheme extended tax relief to *all* parents, including those whose children attended public schools, while the New York provisions covered only parents whose children attended nonpublic schools. *Mueller*, 103 S. Ct. at 3068. This distinction is weak, however, because the Minnesota public schools generally do not charge for tuition. *Id.* at 3072 (Marshall, Brennan, Blackmun and Stevens, J.J., dissenting). The primary incidence of the benefits of the deduction, then, is enjoyed by parents who send their children to tuition-charging private schools. The Minnesota scheme, therefore, is difficult to distinguish from the program invalidated in *Nyquist*. *Id.*

neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause," may provide an avenue of escape from the inconsistent precedents that constitute the court's state-aid-to-education establishment clause jurisprudence.⁴

This article is in part a defense of *Mueller*. The result of the case and its rationale may provide the means to synthesize Supreme Court doctrines concerning religious activities in public schools with doctrines dealing with state aid to religious educational institutions. *Mueller*, however, is used mainly as a point of departure for a more general analysis of the validity of religious exercises in the public schools and of state aid to private, sectarian schools that attempts to derive principles from the former inquiry to govern the latter. If rules exist to regulate the kind of religious activity that the state can allow in its public schools, those same rules also should govern efforts by the state to provide funding to its nonpublic schools. For this to be true, the aid that a state provides to public school children in the form of buildings, materials, and personnel must be converted conceptually into tax dollars spent generally on education. The form in which the state distributes its largesse should not compel a difference in constitutional outcomes.

I will initially propose a test for assessing the validity of state aid to sectarian institutions. I will then analyze public school prayer cases, demonstrating how the results in those cases lead to the proposed test for the state aid cases. This analysis will indicate that the primary problem addressed by the public school cases is the use of state power to promote particular religious messages to the exclusion of other religious or nonreligious messages. I will devote particular attention

4. *Mueller*, 103 S. Ct. at 3069. A state may loan textbooks to children in nonpublic schools. *Wolman v. Walter*, 433 U.S. 229, 236-38 (1977); *Meek v. Pittenger*, 421 U.S. 349, 359-62 (1975); *Board of Educ. v. Allen*, 392 U.S. 236 (1968). But it may not loan instructional materials directly to nonpublic schools or to children enrolled in such schools. *Wolman*, 433 U.S. at 238-41; *Meek*, 421 U.S. at 362-66. A state, however, can make standardized testing and scoring services available to nonpublic schools. *Wolman*, 433 U.S. at 238-41. Moreover, it may reimburse nonpublic schools for administering such tests. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980). Direct money grants for maintenance, however, are prohibited. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-80 (1973). A state is prohibited from providing "auxiliary services" (counseling, testing, speech and hearing therapy, and psychological services) on nonpublic school premises. *Meek*, 421 U.S. at 367-72. But the provision of similar services to nonpublic school children away from the school campus is permitted. *Wolman*, 433 U.S. at 244-48. Diagnostic health services may be offered either on or off campus. *Id.* at 241-42. Finally, a state may fund the transportation of nonpublic school children to and from school. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). But it may not provide transportation for field trips. *Wolman*, 433 U.S. at 252-55.

to the Supreme Court's decision in *Widmar v. Vincent*⁵ to show that no establishment problem is presented when the state merely makes facilities available to all student groups without regard to the religious content of their activities. I will examine next the implications of the proposed test with respect to the tripartite analysis applied by the Court to establishment clause questions presented in the context of state aid to sectarian schools.⁶ After briefly examining the requirement that such statutes "must have a secular legislative purpose,"⁷ I will assert that the sweeping redefinition in *Mueller* of the "effect" test⁸ comports with the analysis advanced earlier. Finally, I will suggest that the final requirement of the court, that such a statute "must not foster an excessive entanglement with religion,"⁹ adds little to the analysis and should be discarded. I begin with a proposed test to assess the validity of state aid to sectarian educational institutions.

I. A PROPOSED ESTABLISHMENT CLAUSE TEST

The test for assessing the validity of state efforts to aid sectarian schools should be as follows: To the extent that the state funds public educational institutions, the state should be permitted to assist non-public schools, including sectarian institutions, as long as the state does not discriminate among the recipients of its assistance on the basis of the religious content (or lack of religious content) of the recipients' educational programs.

At a superficial level, this test resembles the following establishment test proposed by Professor Choper: "[G]overnment financial aid may be extended directly or indirectly to support parochial schools without violation of the establishment clause so long as such aid does not exceed the value of the secular educational service rendered by the school."¹⁰ Choper's test, however, stresses the dual secular and religious character of sectarian education and proposes that the state may fund only the secular aspect.¹¹ This emphasis is similar to the

5. 454 U.S. 263 (1981). The Court invalidated a state university policy of excluding religious groups from the university open forum policy notwithstanding an assertion by the university that including such groups would violate the establishment clause.

6. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

7. *Id.*

8. The statute's "principal or primary effect must be one that neither advances nor inhibits religion." *Id.*

9. *Id.*

10. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 265-66 (1968).

11. Choper observed that "[p]arochial schools perform a dual function, providing some religious education and some secular education. Government may finance the latter, but the

attempts by some of the Justices to draw a distinction between permissible general welfare legislation that benefits religious schools and impermissible direct aid to the educational mission of those schools.¹²

In contrast, my proposed test suggests that government aid may be extended uniformly to all schools regardless of the religious or nonreligious character of their activities or educational programs. That sectarian education has both religious and secular characteristics is of no particular importance, and the test does not purport to isolate and focus on the secular aspect of sectarian education.¹³ In this sense, the proposed test closely corresponds to the neutrality or "religion-blindedness" principle expounded by Professor Kurland:

[T]he proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as

establishment clause forbids it to finance the former." *Id.* at 284 (footnote omitted). Choper then elaborated on why the state may legitimately finance the secular aspect of parochial school education:

[B]y using tax funds to support the secular aspects of parochial education, the state expends no more than would be required either to support parochial school pupils if they attended existing public schools, or to establish additional public schools at various sites for all pupils presently attending parochial schools, neither of which alternatives raises colorable constitutional objection.

Id. (footnote omitted).

12. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 259 (1977) (Marshall, J., concurring in part and dissenting in part). Justice Black, dissenting in *Board of Educ. v. Allen*, distinguished the loan of textbooks upheld in that case from the bus transportation program upheld in *Everson v. Board of Educ.*, 330 U.S. 1 (1947):

The First Amendment's bar to establishment of religion must preclude a state from using funds levied from all of its citizens to purchase books for use by sectarian schools, which although "secular," realistically will in some way inevitably tend to propagate the religious views of the favored sect. Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense, it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service.

Board of Educ. v. Allen, 392 U.S. 236, 252-53 (1968) (Black, J., dissenting). Justice Douglas, also dissenting in *Allen*, stated:

Whatever may be said of *Everson*, there is nothing ideological about a bus. There is nothing ideological about a school lunch, or a public nurse, or a scholarship. The textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith.

Id. at 257. For criticism of attempts to separate the secular and the religious functions of sectarian education, see *infra* notes 102-05 and accompanying text.

13. In practice, however, both Choper's test and my proposed test attain similar results. Both tests view the amount expended by the public schools as a neutral benchmark against which to assess the validity of state aid to nonpublic schools. See Choper, *supra* note 10, at 288. Where the education costs are the same, paying a parochial school the same amount it costs to educate a child in the public school would be valid. *Id.* Moreover, although one would expect Choper to advocate that the subsidy should be limited to the actual cost of a secular education when that cost is lower in the parochial school than in the public school, he suggests that paying the full amount that education costs in the public school would not violate the establishment clause. *Id.*

a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.¹⁴

Like the test suggested here, the Kurland principle would allow the government to finance the entire operational costs of all state-accredited educational institutions, including those controlled by a religious organization, because the classification—state-accredited educational institutions, which includes most ordinary parochial schools—is not in the religious terms that his doctrine forbids.¹⁵

This approach is the most desirable. As I will indicate next, the chief problem presented in establishment clause cases arising in the public school context inheres in the state placing its imprimatur upon a particular religious belief or observance, or a restricted selection of religious beliefs or observances, to the detriment of other religious or nonreligious messages. This problem is eliminated when the state provides funding or assistance universally without regard to the religious or nonreligious content of its beneficiaries' activities.

II. RELIGIOUS EXERCISES IN THE PUBLIC SCHOOLS

I will now assess the constitutionality of religious exercises in public schools. Initially, I will examine the school prayer and released time decisions, concluding that these cases prohibit only affirmative promotion of prayer or religious activity by the government. The problem of government sponsorship of religion does not exist when the state makes facilities or funds available to all groups, without discriminating among recipients; government thereby *permits* religious activity without *sanctioning* any particular religious beliefs. I will test this hypothesis in two separate contexts: (1) the observance of a moment of silence at the start of the public school day, and (2) the use of public school facilities as a limited public forum available to religious and nonreligious groups. But first, I will consider the Supreme Court decisions concerning school prayer and released time.

A. *The School Prayer and Released Time Cases*

In a pair of cases twenty years ago, the Supreme Court invalidated state-required recitation of prayers at the beginning of class in public

14. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961).

15. Choper, *supra* note 10, at 270. For criticism of the Kurland rule, see *id.* at 271 (A shortcoming of [Professor Kurland's] approach is that it permits the employment of tax-raised funds for strictly religious purposes).

schools. The first case, *Engel v. Vitale*,¹⁶ held unconstitutional the practice of reciting prayers composed by school officials and read by public school students at the start of each day.¹⁷ The second decision, *School District of Abington Township v. Schempp*,¹⁸ dispelled any notion that the constitutional defect in *Engel* was that state officials actually had *composed* the prayer. *Schempp* invalidated the reading of passages from the Bible and the recitation of the Lord's Prayer at the beginning of each school day.

In both cases, the Court firmly asserted that no showing of government coercion need exist to find a violation of the establishment clause.¹⁹ This broad conclusion, however, was not necessary to either decision.²⁰ When presented with religious exercises in public schools, students face a strong, but subtle, pressure to conform,²¹ and the cases could have been more discretely decided on the grounds that compulsion did exist; that a showing of actual compulsion was unnecessary because of the 'indirect coercive pressure' that [these programs] exerted; that the program[s] would result either in the young children of the minority groups involved taking part in a religious exercise that was contrary to their conscientious beliefs or in their being singled out as 'oddballs' by their peers. . . .²²

16. 370 U.S. 421 (1962).

17. The "Regent's Prayer" was exceedingly nondenominational:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.

Id. at 422.

18. 374 U.S. 203 (1963).

19. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel*, 370 U.S. at 430. "[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Schempp*, 374 U.S. at 223.

20. See Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 342-43 (1963).

21. See *id.* at 343-46.

22. *Id.* at 342-43 (quoting *Engel*, 370 U.S. at 431). The Court's insistence that the school prayer programs could not be saved from invalidation even if children were excused from participating confirms its assertion that coercion is unnecessary for an establishment clause violation. See, e.g., *Schempp*, 374 U.S. at 224-25 ("Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for the fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.") Requiring a dissenter consciously to excuse himself, however, is itself coercive. Certainly, children faced with such a choice run the risk of "being singled out as 'oddballs' by their peers." Choper, *supra* note 20, at 343. Professor Choper's test for assessing the validity of religious exercises in public schools also stresses coercion:

[F]or problems concerning religious intrusion in the public schools, the establishment clause of the first amendment is violated when the state engages in what may be fairly characterized as *solely religious activity* that is likely to result in (1) *compromising* the student's religious or conscientious beliefs or (2) *influencing* the student's freedom of religious or conscientious choice.

Choper, *supra* note 20, at 330.

Indeed, the Justices recognized the coercive nature of the school prayer programs they invalidated. In his majority opinion in *Engel*, Justice Black wrote,

This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.²³

Moreover, in their concurring opinion in *Schempp*, Justices Goldberg and Harlan made a similar observation:

The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the first amendment.²⁴

The conclusion that school prayer programs are inherently coercive may well be inevitable. Prayer in public schools is an example of direct and active government involvement in and sponsorship of particular religious views to the detriment of other religious and nonreligious beliefs.²⁵ In this light,

[T]he decisions in *Engel* and *Schempp* exclude neither religion nor prayer from the public schools, but only *officially sanctioned* religious activity. They prohibit not religion but government's affirmative promotion of prayer and its direct and active involvement in religious

23. *Engel*, 370 U.S. at 430-31.

24. *Schempp*, 374 U.S. at 307 (Goldberg & Harlan, J.J., concurring). Justice Brennan's concurring opinion in *Schempp* also suggests the importance of the coercive effect of required school prayers, although it does so somewhat obliquely. Brennan distinguished the holdings in *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245 (1935), which upheld state power to compel military exercises at a state university against students' asserted religious convictions, and *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which denied state power to expel students for their refusal to observe the flag salute ceremony, because of the presence of voluntarism in one and coercion in the other: "Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance of young children at elementary and secondary schools. This distinction warrants a difference in constitutional results." 374 U.S. at 252-53 (Brennan, J., concurring).

25. Unlike other establish clause questions, the school prayer issue does not involve the mere *neutral* provision of wholly *secular* government services, such as fire and police protection, to both religious and secular institutions. Nor does it involve the mere *neutral* and essentially *passive* acquiescence of government in the conduct of both religious and secular activities on government property. . . . Rather government sponsored prayer in the public schools involves *direct* and *active* government involvement in the encouragement and structuring of perhaps the most basic form of religious activity—prayer itself.

Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 827 (1983).

expression. . . . *Engel* and *Schempp* leave ample room for religion in the school environment."

Defining the contours of permissible religious activity in the public school classroom requires the construction of a line that separates state-sanctioned from state-permitted religious activity.²⁷ In turn, this line depends on neutrality or uniformity. In other words, the state, in structuring its public school curriculum or in making available some sort of assistance, must make no distinctions on the basis of religious content.²⁸ Before examining two possible areas of permissible religious activity in the public schools, the moment of silence legislation and the use of school facilities as public fora, a brief discursive into the released time cases decided by the Supreme Court is in order. The focus on state coercion and official sanction suggested here may provide an explanation for the contradictory results in those cases.

In *Illinois ex rel. McCollum v. Board of Education*,²⁹ the Court struck down an Illinois released time program in which the state permitted religious teachers employed by private religious groups to come into public school buildings during school hours to lead classes in religious instruction. Pupils were released from their regular classes to attend the religious classes; students who did not attend were required to pursue their secular studies in other classrooms.³⁰ Justice Black, writing for the Court, stressed the coercive nature of the program:

The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.³¹

Four years later, however, in *Zorach v. Clauson*,³² the Court upheld

26. *Id.* at 843 (emphasis added).

27. Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need a Constitutional Amendment*, 61 N.C.L. REV. 141, 143 (1982).

28. *Id.* (the key is neutrality); see Kurland, *supra* note 14, at 5; *supra* text accompanying note 14.

29. 333 U.S. 203 (1948).

30. *Id.* at 204, 207.

31. *Id.* at 209. Justice Frankfurter, concurring in *McCollum*, stated that "the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care." *Id.* at 228; see also Choper, *supra* note 20, at 353 ("The *McCollum* decision can only be accounted for on the ground that the operation of the released time program—a program having no independent primary secular goal—resulted in compromising the conscientious beliefs of the complainant's child.").

32. 343 U.S. 306 (1952).

a New York program that permitted public schools to release students during the school day for off-campus religious instruction. Once again, the state required students who were not released to stay in the classroom.³³

Although adopting Justice Douglas' proffered distinction that *Zorach* involved "neither religious instruction in public school classrooms nor the expenditure of public funds" and was "therefore unlike *McColum*"³⁴ is tempting, the cases can be distinguished by the degree of state coercion involved in each.³⁵ By requiring the religious classes to be held away from public school grounds, the state action with respect to religious instruction did not have the same coercive character, or the same offensive state seal of approval, that condemned the released time program in *McColum*. Indeed, requiring the students to leave for religious instruction seems indicative of state *disdain* for, rather than approval of, religious education.

Upon reflection, however, this argument is less than compelling. While the practice upheld in *Zorach* may have been less coercive than the practice invalidated in *McColum*,³⁶ the fact remains that the state used "the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes."³⁷ A state decision to release all children, so that some could attend religious classes while the rest could pursue whatever activities they wished, religious or nonreligious, would be sufficiently neutral and would not offend the establishment clause.³⁸ A plan that releases only students

33. *Id.* at 308.

34. *Id.* at 308-09.

35. [I]t is inaccurate to contend that the *Zorach* Court distinguished *McColum* on the ground that "public . . . funds were not used in New York." Rather, the Court stressed that in *McColum* "the force of the public school was used to promote [religious] instruction," whereas the Court found this not to be so in New York. Choper, *supra* note 10, at 307 (quoting *Zorach*, 343 U.S. at 308-09). The *Schempp* court also distinguished *Zorach*:

These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson*.

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963).

36. Justice Douglas concluded that there was no evidence to support the conclusion that the state coerced children to take religious classes. "If in fact coercion were used . . . a wholly different case would be presented." *Zorach*, 343 U.S. at 311; *see also id.* at 321 (Frankfurter, J., dissenting) ("coercion in the abstract is acknowledged to be fatal").

37. *Id.* at 317 (Black, J., dissenting).

38. *See McColum*, 333 U.S. at 230-31 (Frankfurter, J., concurring) ("Champaign might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning").

who are prepared to attend particular religious classes in lieu of compelled secular education would be unconstitutional.³⁹ In accordance with the coercion and official sanction concerns and the neutrality of uniformity principles asserted thus far, *Zorach* was decided wrongly.⁴⁰

B. A Moment of Silence

One way in which a state may be able to permit religious activity in public schools without placing its imprimatur upon a particular religious viewpoint in opposition to other religious beliefs, or upon religion in opposition to nonreligion, is the observance of a moment of silence at the start of each school day.⁴¹ Arguably, this practice possesses the requisite neutrality because students are free to think what they wish. A moment of silence should be constitutional even if some students use it to reflect on their religious beliefs or to pray.⁴² Unfortunately, the case law is mixed. Courts that have considered the issue have split as to the propriety of observing a moment of silence.⁴³

39. There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. . . . The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend.

Zorach, 343 U.S. at 320-21 (Frankfurter, J., dissenting). Justice Jackson, dissenting in *Zorach* argued that "[t]he distinction attempted between [*McCullum* and *Zorach*] is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity." *Id.* at 325 (Jackson, J., dissenting).

40. See Choper, *supra* note 20, at 363 ("Because of the presence of inherent coercion, it seems that *Zorach* was incorrectly decided. . . .").

41. Stone argues that a minute of silence at the beginning of the school day is a reasonable accommodation of religion. Stone, *supra* note 25, at 844-45; cf. Loewy, *supra* note 27, at 143. (Allowing different students to begin class with a philosophical statement of their own choosing, each student being allowed to speak or the speaker of the day being chosen at random, without regard to the content of his message, constitutes valid state-permitted prayer not invalid state-sanctioned prayer.)

42. Cf. Loewy, *supra* note 27, at 153 ("The establishment clause prohibits the state from favoring theistic prayers over other philosophical utterances; it does not prohibit individuals from choosing theistic prayers.").

43. Courts upholding the practice appear to be in the minority. See *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976); cf. *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (upholding practice of permitting student-initiated prayer at the beginning of the school day but before the beginning of classes). Several recent opinions have invalidated moment of silence statutes; See *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *cert denied*, 104 S. Ct. 1707 (1984); *May v. Cooperman*, 571 F. Supp. 1561 (D.N.J. 1983); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983); cf. *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (invalidating statute authorizing voluntary student and teacher prayers in public schools, notwithstanding that no student or teacher was compelled to pray), *aff'd mem.*, 455 U.S. 93 (1982); *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (permitting student council to recite prayers and bible verses at student

I will make no effort, however, to settle the issue. For purposes of my argument, showing that the division among the courts centers on whether a moment of silence is *in fact* neutral and not on whether a neutral accommodation is itself violative of the establishment clause is sufficient.

*Gaines v. Anderson*⁴⁴ held that a Massachusetts statute requiring the observance of a period of silence for prayer or meditation at the start of the school day did not violate the establishment clause. After noting that the effect of the statute was to allow students to use the period of silence as they wished,⁴⁵ the court analyzed the legislative purpose and upheld the statute on principles closely corresponding to the neutrality principles advanced earlier:

We think that the lack of any mandatory direction to students to meditate or pray clearly indicates a legislative purpose to maintain neutrality The fact that the . . . program provides an opportunity for prayer to those students who desire to pray during the period of silence does not render the program unconstitutional.⁴⁶

Subsequent courts that have reached the opposite result disagreed with *Gaines* on two points. First, the legislative purposes of the statutes at issue were analyzed, and in each case, the court found the purpose to be religious and, therefore, impermissible.⁴⁷ Second and much more important, the courts doubted whether observing a moment of silence was in fact neutral and concluded that requiring such observances "implies recognition of religious activities. . . as an integral part of the [School] District's program"⁴⁸ This expression of doubt

assemblies during school hours violated the establishment clause despite the fact that attendance at the assemblies was voluntary).

44. 421 F. Supp. 337 (D. Mass. 1976).

45. The effect of the statute "is to accommodate students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters." *Id.* at 343.

46. *Id.* at 344.

47. See *May v. Cooperman*, 572 F. Supp. 1561, 1573 (D.N.J. 1983) ("Both the history of this kind of legislation and the circumstances of the adoption of this particular Bill point inescapably to an essentially religious purpose."); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1015, 1019 (D.N.M. 1983) (finds clear purpose to establish a devotional exercise in the public schools). One commentator has suggested that a religious purpose may be divined from the almost universal passage of such statutes only *after* the Supreme Court invalidated school prayer statutes. See Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1880 (1983). But see *Gaines*, 421 F. Supp. at 341 (the timing of the enactment of moment of silence legislation, in the aftermath of the prayer cases, would not, of itself, establish an impermissible purpose to advance religion). I do not suggest that inquiring into legislative purpose is inappropriate or advocate any change in the purpose prong of the Supreme Court's tripartite establishment test. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *infra* notes 88-94 and accompanying text. Therefore, to consider the issue further in this article is unnecessary.

48. *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1020 (D.N.M. 1983) (quoting

as to the neutrality of the legislation leaves intact the premise of the decision in *Gaines* that the neutral provision of assistance by the state to all forms of expression in the public school context does not violate the establishment clause, even if some students take the opportunity to turn that assistance to religious uses.

Whether such laws are merely neutral accommodations of religious and nonreligious beliefs, and therefore constitutionally permissible, or whether the moment of silence creates enough of a religious impression to advance religion impermissibly remains unsettled. But at least the courts on both sides of the issue are asking the right question: Is the challenged practice a truly neutral benefit extended to all groups, or does the state in fact place its imprimatur upon religion? I will consider next a situation in which courts have concluded that neutral assistance by the state to all viewpoints, whether religious or nonreligious, does not offend the establishment clause: the use of public school facilities are used as a limited public forum.

C. Public Fora and Public Schools

In terms of the neutrality or uniformity principles thus far expressed, a state should be able to make public school facilities available to all student groups to hold meetings, conduct activities, or observe ceremonies, even if particular groups use those facilities for religious

Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1045 (5th Cir. 1982)). The court in *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982), made a similar observation:

Unavoidably, students will understand that they are being encouraged not only to be silent, but also to engage in religious exercises. It cannot be seriously argued, and certainly cannot be assured, that nice distinctions concerning the potential meanings of "meditation" and "personal beliefs" will naturally arise in the minds of public school students.

Id. at 1165; see also Note, *supra* note 47, at 1888 ("The use of compulsory attendance laws to compel student presence during a moment of silence gives the impression of state support of religion. . . . If the students perceive the moment of silence as a religious exercise in the public school . . . the effect of the statute will be to advance religion").

The *Duffy* court raised the possibility of excessive entanglement between church and state as an additional reason to invalidate the statute. *Duffy*, 557 F. Supp. at 1021. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), however, the Supreme Court concluded that payment of salary supplements to *parochial* school teachers fostered excessive entanglement. *Duffy* incorrectly applied this argument to state supervision of *public* school teachers. The supervision by the state of its own employees creates no entanglement problems. Note, *supra* note 47, at 1893 n.110. For this reason, entanglement is not likely to be a decisive factor in the moment of silence context. *Id.* at 1893. But cf. *May v. Cooperman*, 572 F. Supp. 1561, 1575 (D.N.J. 1983) ("Implementation of the [moment of silence] Bill would not involve the State in the kind of continued and pervasive monitoring of sectarian activities which was condemned in *Lemon v. Kurtzman* It would, however, tend to promote divisiveness among and between religious groups, another form of entanglement.").

meetings, religious observances, or prayers.⁴⁹ When students voluntarily originate religious exercises in response to a school policy that encourages all kinds of student organizations to meet on school property, any constitutional objections to religious activities on public school grounds should be avoided.⁵⁰ These meetings “do not entail the appearance of state sponsorship, the transfer of public funds in support of religious activity, or active state promotion or participation in religious exercises.”⁵¹ The constitutional protection inheres in the required neutrality or uniformity of state allocation of facilities. As long as accessibility is nonideological, the establishment clause should not require the state to forbid the use of state facilities for prayer or for religious meetings.⁵²

The earliest cases to reach the issue, however, decided against the validity of allowing student use of public school classrooms for prayer sessions or for religious meetings as part of a more general program that made classrooms available to a variety of student organizations.⁵³ Although each court found that the challenged practice had a secular purpose,⁵⁴ each concerned itself primarily with the symbolic effect of allowing student religious use of public school classrooms. For example, the court in *Brandon v. Board of Education*⁵⁵ concluded

49. Loewy, *supra* note 27, at 143 (By making classrooms available before or after school or during recess to any group of students, the state permits but does not sanction school prayer).

50. Note, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds*, 50 U. CIN. L. REV. 740, 785 (1981).

51. *Id.*

52. Loewy, *supra* note 27, at 143.

53. See, e.g., *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1981) (upheld, against students' free exercise claims, a school board's refusal to permit communal prayer meetings on school premises on strength of the board's contention that granting the students' request would violate the establishment clause), *cert. denied*, 454 U.S. 1123 (1982); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 12, 137 Cal. Rptr. 43, 49 (permitting bible study club to meet and conduct its activities on the school campus during the school day was prohibited by the establishment clause), *cert. denied*, 434 U.S. 877 (1977); *Trietly v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978) (upheld school board refusal to permit formation of bible clubs in public high schools as the proposed club meetings would violate the establishment clause).

54. See, e.g., *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1981) (“A neutral policy granting all student groups, including religious organizations, access to school facilities reflects a secular, and clearly permissible purpose—the encouragement of extracurricular activities.”), *cert. denied*, 454 U.S. 1123 (1982); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 12, 137 Cal. Rptr. 43, 49 (Permitting “student organizations to conduct their activities on school campuses during the school day in accordance with district rules and regulations is in the abstract secular in nature.”) *cert. denied*, 434 U.S. 877 (1977). Both *Brandon* and *Johnson* found excessive entanglement in the official supervision of the school's secular schedule, maintenance, and safety and in the need for official supervision of the students' activities to make sure that participation was voluntary and that membership was nondiscriminatory. *Brandon*, 635 F.2d at 979; *Johnson*, 68 Cal. App. 3d at 14, 137 Cal. Rptr. at 50. The *Johnson* court also noted the danger of political divisiveness in allowing the formation of religious clubs. *Id.* at 14-15, 137 Cal. Rptr. at 150-51.

55. 635 F.2d 971 (2d Cir. 1981), *cert. denied*, 454 U.S. 1123 (1982).

that permitting prayer meetings would create an improper appearance of official support, violating the constitutional prohibition against impermissible advancement of religion.⁵⁶ The court noted that "[t]o an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic effect is too dangerous to permit."⁵⁷ Moreover, the court in *Johnson v. Huntington Beach Union High School District*⁵⁸ found the impermissible symbolic effect in the fact that the school board rules at issue would render the Bible club seeking student club status an entity "sponsored by the school."⁵⁹ To the *Johnson* court, therefore, placing the support and sponsorship of the school behind the club and making its activities part of the school's extracurricular program impermissibly placed the imprimatur of the state on the club's activities.⁶⁰

Both *Brandon* and *Johnson* were correct in focusing on whether the state "placed its imprimatur on a particular religious creed." But their conclusion that the state is associated symbolically with student use of classrooms for religious purposes is flawed. Unlike the prayer cases,⁶¹ no direct state action mandates or promotes prayer.⁶² The practice ought to be upheld.

The issue may have been settled, however, by the Supreme Court decision in *Widmar v. Vincent*.⁶³ In that case, the Court invalidated

56. *Id.* at 978-79. The court further concluded in dicta that this improper symbolic effect was not present when the connection between the asserted benefit to religious groups and the core educational mission of the school became more attenuated. *See id.* at 978-79 ("the semblance of official support is less evident where a school building is used at night as a temporary facility by religious organizations, under a program that grants access to all charitable groups.") (citing *Resnick v. East Brunswick Township Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978)) (permitting religious groups to rent public school facilities at a rate reflecting the cost incurred by the school board did not violate the establishment clause); *id.* at 979 ("where a clergyman briefly appears at a yearly high school graduation ceremony no image of official state approval is created.") (citing *Wood v. Mount Lebanon Township School Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972)).

57. *Id.* at 978; *see also Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 13, 137 Cal. Rptr. 43, 49 ("The 'primary effect' test bespeaks not only of financial assistance but also necessarily inquired whether the consequence of state action is to place its imprimatur upon the religious activity. . . . This aspect of the effect test reaches the essence of the Establishment Clause proscription."), *cert. denied*, 434 U.S. 877 (1977).

58. 68 Cal. App. 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).

59. *Id.* at 13, 137 Cal. Rptr. at 50.

60. *Id.*

61. *See supra* notes 16-28 and accompanying text.

62. Note, *supra* note 50, at 768-69.

63. 454 U.S. 263 (1981); *see* 66 MARQ. L. REV. 178, 192 (1982) (concluding that *Widmar* may signal a willingness by the present Court to reconsider the question of religious activities in all public schools and that the case provides a strong basis for attacking lower court decisions that have prohibited student-initiated religious activities in public secondary schools).

a state university policy of excluding religious groups from an open forum policy that made university facilities available for activities of registered student groups. *Widmar* held that the free speech clause invalidated the university's exclusionary policy.⁶⁴ The case is of particular interest, however, because the Court dwelled on the validity of the open forum policy under the establishment clause.⁶⁵ While the Court agreed with the university that preventing establishment clause violations constituted a compelling state interest, it observed that "it does not follow . . . that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases."⁶⁶ Because all the parties conceded that the open forum policy had a valid secular purpose and did not risk excessive entanglement between church and state,⁶⁷ the Court concentrated on the effect of allowing religious

64. Interestingly, the Court elected to rest on the free speech guarantee of the first amendment rather than the free exercise clause. See *id.* at 269 n.6 (argues that religious speech is entitled to constitutional protection). But see *id.* at 286-87 nn.4-5 (White, J., dissenting) (doubts whether a public forum must be open to regular religious speech simply because it is open to all kinds of speech). Courts repeatedly have rebuffed the claims of student religious groups that denial of equal treatment with other student groups amounts to a denial of free exercise rights. See, e.g., *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (school board refusal to permit communal prayer meetings on school premises did not limit the free exercise rights of members of a student prayer group), *cert. denied*, 454 U.S. 1123 (1982); *Hunt v. Board of Educ.*, 321 F. Supp. 1263 (S.D.W. Va. 1971) (school board prohibition of use of school buildings for any religious activities did not deny public school students their free speech, freedom of assembly, or free exercise rights). *Widmar* did nothing to change this. See *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983) (school district refusal to allow a student-initiated prayer club to meet during an activity period established to encourage students to organize clubs and groups violated students' free speech rights, but did not violate their free exercise rights); *infra* note 80 and accompanying text.

Focusing on students' free speech rights, however, is particularly appropriate in the context of student access to public school facilities. Allowing students to form whatever clubs they please, whether religious or nonreligious, as long as the state neither advantages or disparages particular groups because of the religious content of their activities, is one way to implement the admonition of *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) that schools should not be " 'enclaves of totalitarianism,' but places where 'leaders [are] trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection.'" Loewy, *supra* note 27, at 156 (quoting *Tinker*, 393 U.S. at 511-12).

65. In defending its policy, the university claimed a "compelling interest in maintaining strict separation of church and state," an interest it derived from the establishment clause. *Widmar*, 454 U.S. at 270.

66. *Id.* at 271.

67. *Id.* at 271-72. As to the purpose of the policy, the Court made the following revealing observation in rebutting the university's contention that using its rooms for religious speech would undermine its secular aim of providing a student forum:

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups but *not* by others.

. . . In those cases, the school may appear to sponsor the views of the speaker. *Id.* at 275 n.10 (citation omitted). As to entanglement, the Court stated: "[T]he University would risk greater entanglement by attempting to enforce its exclusion of 'religious worship and religious speech' than by having an open forum policy." *Id.* at 271 n.10.

groups to use such a forum. The primary effect, the Court concluded, would not be the advancement of religion: "[W]e are unpersuaded that the primary effect of the public forum, open to all forms of disclosure, would be to advance religion. . . . An open forum in a public university *does not confer any imprimatur of State approval on religious sects or practices*".⁶⁸

Before courts can apply this rationale to public schools, one obstacle must be overcome. *Widmar* involved college students, not public school children. Arguably, this age difference could lead to a difference in constitutional outcome, because younger, more impressionable public school children are entitled to heightened protection.⁶⁹ *Widmar* did not foreclose this possibility: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion."⁷⁰

Some courts have seized on this opening to invalidate school policies that permit student religious groups to use public school facilities on the same terms as other student groups. For example, in *Lubbock Civil Liberties Union v. Lubbock Independent School District*⁷¹ the Fifth Circuit held that a school district policy permitting students to gather at school with supervision either before or after school hours to meet voluntarily for "educational, moral, religious, or ethical purposes" violated the establishment clause. Citing the *Widmar* distinction between university students and younger children, the *Lubbock* court concluded that the implicit approval by the school district of extracurricular religious meetings, "in combination with the impressionability of secondary and *primary* age school children and the possibility that they would misapprehend the involvement of the

68. *Id.* at 273-74 (emphasis added). This language will be addressed further in the next section, which proposes that the question whether state aid to a sectarian school in a particular instance confers the "imprimatur of state approval" on religious acts or practices should become the core of the Supreme Court's primary effect test. See *infra* notes 108-14 and accompanying text.

The Court also apparently relied on the fact that no evidence existed that religious groups would dominate the forum: "Second, the forum is available to a broad class of nonreligious as well as religious speakers. At least in the absence of empirical evidence that religious groups will dominate [the] open forum . . . the advancement of religion would not be the forum's primary effect." *Id.* at 274-75. This also will be addressed in the next section. See *infra* notes 115-19 and accompanying text.

69. "The potential effect of *Widmar* on the permissible role of student religious organizations in public schools is unclear. While the Court may extend it full force, universities do not share 'the special place of public schools in American life' and university students are less impressionable than their younger counterparts." Stone, *supra* note 25, at 846-47 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 14-5, at 825 (1978)).

70. *Widmar*, 454 U.S. at 273 n.13.

71. 669 F.2d 1038 (5th Cir. 1982).

[d]istrict in these meetings, renders the primary effect of the policy impermissible advancement of religion.”⁷²

Widmar uses its conclusion that younger students are more impressionable than their older counterparts in a way that is at variance with earlier establishment clause cases. *Tilton v. Richardson*⁷³ raised the fact that college students are “less impressionable and less susceptible to religious indoctrination because it reduced the need for entangling state supervision to make sure that the buildings at issue were not used to further religious indoctrination.”⁷⁴ In *Lemon v. Kurtzman*,⁷⁵ the Court employed the same reasoning to reach an opposite conclusion that with younger, more impressionable children, the need for entangling supervision is *heightened*.⁷⁶ Against this background, the *Widmar* application of the concept of *impressionability*—that is, susceptibility to outside influences appears misplaced in the open forum context.⁷⁷ The danger posed in the public forum is not the risk of state-promoted religious indoctrination; the state supplies no messages, religious or otherwise, for presentation in its forum, but instead makes available facilities to everyone. Rather, the danger is the more subtle risk that students will *misperceive* the role of the state and conclude that the state in fact approves of some or all of the religious activities that take place in its forum. The contention that public school students are more likely than college students to conclude that the state tacitly endorses religious activity when it creates a public forum available to everyone is difficult at best. Such a perception is far more likely when the state directly and overtly uses its facilities and coercive powers to further one religion at the expense of others or of nonreligion. Students most likely will perceive an endorsement of religion if the state requires school prayer in classrooms or extends benefits only to the adherents of certain religious tenets to the exclusion of all others.

Only one court has recognized that the problem is one of perception rather than of impressionability. *Bender v. Williamsport Area*

72. *Id.* at 1045-46. The court also concluded that the purpose of the school district policy, “ostensibly designed to allow many groups to meet,” was, “when examined in the context of the total school policy, more clearly designed to allow the meetings of religious groups.” *Id.* at 1044-45. Moreover, the “use of the District’s facilities and its continuing supervision of the religious meetings create the entanglement which leads to an impermissible establishment of religion.” *Id.* at 1046.

73. 403 U.S. 672 (1971).

74. *Id.* at 686.

75. 403 U.S. 602 (1971).

76. *Id.* at 618-19.

77. Note, *supra* note 50, at 769 n.173.

*School District*⁷⁸ invalidated a school district refusal to allow a student-initiated prayer club to meet during an activity period established to encourage students to organize clubs⁷⁹ because that refusal violated the students' free speech rights.⁸⁰ Like *Widmar*, *Bender* focused on whether allowing religious groups access to the activity period would violate the establishment clause. The court noted that the activity period "evinces an 'important index of secular effect' in that it is open to a 'broad spectrum of student groups'" and that "[g]iven the range of interests accommodated by the activity period . . . like treatment of [the prayer group] would confer a 'general benefit' upon it rather than furthering its aims."⁸¹ Consequently, the court concluded that the open forum did not place the imprimatur of the state on religion or on religious practices.⁸² To support this conclusion, the court relied on two grounds. First, the court asserted that high school students were mature enough to perceive that the open forum did not constitute tacit state approval of religious activity.⁸³ Second, the *Bender* court recognized the importance of direct state action or state coercion in assessing whether the state has lent its approval to a particular religion:

Engel, *Schempp*, and *McCullum* involved religious activity not merely allowed by the state but required by it Although the Supreme Court has noted that the presence or absence of state coercion is not dispositive in Establishment Clause cases, such a factor appears important in gauging the likelihood that the government will be taken to have placed its imprimatur on a given religious practice.

The lack of en masse activity together with the more varied alternatives reduces any perception of state approval or student embarrassment.⁸⁴

The court therefore found that the use of the public school as a public forum available to both religious and nonreligious groups did not violate the establishment clause.

So far, I have interwoven the danger of officially-sanctioned religion

78. 563 F. Supp. 697 (M.D. Pa. 1983).

79. . The students had requested permission to form a club and to meet during the activity period on the same basis as other student groups. That request was denied. No other group previously had been denied the same opportunity. *Id.* at 698-99.

80. The court observed that by implementing its activity period, the state had created a limited public forum, like that in *Widmar*. *Id.* at 703-06. Therefore, "a content based decision to exclude subject matter would require compelling state interest scrutiny." *Id.* at 706. The court also held that the refusal of the district did not violate the students' free exercise rights because it did not force students to forgo their religious belief in group worship. *Id.* at 701-03.

81. *Id.* at 711 (quoting *Widmar*, 454 U.S. at 274).

82. *Id.* at 712-13.

83. *Id.* at 712.

84. *Id.* at 713.

and the concept of neutrality and have drawn the line delimiting state-sanctioned and state-permitted religious activity. I first isolated the direct action of the state to promote religious activity by lending the weight of official sanction—the imprimatur of state approval—to particular religious practices or to religion itself as the predominant vice in the school prayer and released time cases. As long as the state makes no attempt to discriminate among its beneficiaries on the basis of the religious content of their activities, the constitutional objection is eliminated when the state neutrally opens facilities to all who wish to use them, permitting the expression of religious messages in conjunction with all other messages. The threat of officially-sanctioned religion is dispelled when the challenged religious activity is initiated voluntarily by students rather than imposed unilaterally by the government. I then tested this argument in two contexts: (1) the observance of a moment of silence in public classrooms, and (2) the use of public schools as public fora. Although the legality of moment of silence laws is unclear, courts on both sides of the issue have focused correctly on whether such legislation is merely a neutral accommodation of religious and nonreligious viewpoints or whether it represents tacit state promotion of religious exercises in the public schools. As to the public forum, the *Widmar* rationale that an open forum “does not confer any imprimatur of State approval,” when viewed in the abstract, strongly supports the neutrality principles advanced here. Any remaining problems with impressionability or misperception are reduced in the public aid cases considered in the next section. When the state expands the contours of its subsidized “forum” beyond the confines of the classroom to embrace its entire educational program, the audience comprises *parents* who voluntarily initiate and choose between the various educational opportunities made possible by state assistance. These parents represent mature adults who resemble the college students involved in *Widmar*, not the younger children who populate the public school’s open forum.

III. STATE AID TO PAROCHIAL SCHOOLS

The United States Supreme Court has expanded establishment clause jurisprudence beyond the confines of the public education system to embrace state efforts to provide assistance to private parochial schools. In so doing, the Court gradually has developed a three part test to determine the validity of providing assistance to private parochial schools. The Court first articulated an establishment clause test in *Lemon v. Kurtzman*, a case that invalidated a Rhode Island statute providing a salary supplement to teachers at certain nonpublic schools

and a Pennsylvania statute allowing school boards to "purchase secular educational services" from nonpublic schools.⁸⁵ The *Lemon* Court stated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁸⁶

I now will examine each of the three prongs of the *Lemon* test and suggest modifications to each prong to bring the test in conformance with the neutrality principles expounded in the first section and derived from the previously discussed cases. This is a process that the Court has begun with *Mueller v. Allen*.⁸⁷ The process entails drawing a distinction between state-sanctioned and state-permitted religious activity. As with the problems discussed earlier, the key is neutrality.

A. Secular Legislative Purpose

Preventing governmental action for religious purposes, whether overt or covert, is perhaps the central concern underlying the establishment clause.⁸⁸ The purpose test developed by the Court, however, is a

85. 403 U.S. 602 (1971).

86. *Id.* at 612-13. The focus of the Court on purpose and effect was presaged by Justice Clark's opinion in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963):

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222. The origins of the entanglement prong of the *Lemon* test can be found in Justice Goldberg's and Justice Harlan's concurrence in *Schempp*: "[B]oth the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other." *Id.* at 306 (Goldberg and Harlan, J.J., concurring).

In his concurring opinion in *Schempp*, Justice Brennan proposed an alternative test: "Equally the Constitution enjoins those involvements of religion with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice." *Id.* at 231 (Brennan, J., concurring). Justice Brennan's test does not support the neutrality approach advanced here. The first two parts of the test apparently would invalidate most of the state permitted religious activity discussed earlier. See notes 42-84 *supra* and accompanying text. Observing a moment of silence at the start of the public school day or allowing student religious groups to use public school facilities on the same terms as other groups, arguably would both "serve the essentially religious activities or religious institutions" and "employ the organs of government for essentially religious purposes." The third part of Justice Brennan's test apparently would exclude almost any attempt by the state to include parochial schools in its educational program. See *Schempp*, 374 U.S. at 431.

87. 103 S. Ct. 3062 (1983); see *supra* notes 1-4 and accompanying text.

88. See Choper, *supra* note 10, at 268-69 ("Government action for religious purposes is highly suspect . . . [G]overnmental action for secular purposes does not fall within the core of the establishment clause's concern. . . .").

relatively tiny hurdle that can be overcome by asserting that the purpose of a particular educational program is the promotion of education.⁸⁹ Indeed, the Court only once has invalidated a statute because an impermissible religious purpose was found. In *Stone v. Graham*, the Court struck down a Kentucky statute that required public schools to post copies of the Ten Commandments on classroom walls.⁹⁰ The Court stated that “[t]he preeminent purpose for posting the Ten Commandments is plainly religious in nature [A]nd no legislative recitation of a supposed secular purpose can blind us to that fact.”⁹¹

Unlike the schemes earlier discussed, the statute in *Stone* was not a neutral provision that benefitted both religious and nonreligious interests alike. Rather, *Stone* involved direct and active government support of a particular religious message. The Court, therefore, was correct to strike it down.

No modification of the purpose prong of the *Lemon* test is necessary. State educational programs that stand up under the neutrality test proposed in the first section may be premised on either of two secular purposes. First, proponents of such programs may assert that their goal is the promotion of education itself. This probably will satisfy the various pronouncements by the Court on the secular purpose requirement.⁹² Second, proponents of including parochial schools in some capacity as part of a state educational program may claim that their purpose is to promote diversity and a pluralistic society, an argument made by Justice Brennan in his concurring opinion in *Walz v. Tax Commission*.⁹³ Indeed, this argument is more compelling where the state provides benefits to a broad spectrum of groups that include religious institutions than it was in *Walz*, where the state

89. See, e.g., *Roemer v. Board of Pub. Works*, 426 U.S. 736, 754 (1976) (“[A]ppellants do not challenge the . . . finding that the purpose of Maryland’s aid program is the secular one of supporting private higher education generally, as an economic alternative to a wholly public one.”); *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 in all schools covered by the compulsory attendance laws. . . . [W]e find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.”); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (“The express purpose of [the statute] was . . . the furtherance of the educational opportunities available to the young.”).

90. 449 U.S. 39 (1980).

91. *Id.* at 41. In distinguishing various educational assistance programs, the Court stated that “[s]uch assistance has the obvious legitimate secular purpose of promoting educational opportunity. The posting of the Ten Commandments has no such secular purpose.” *Id.* at 43 n.5.

92. See *supra* note 89.

93. [G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.

397 U.S. 664, 687 (1970) (Brennan, J., concurring).

instituted a tax exemption that was specifically tailored to benefit religious organizations.⁹⁴ Establishing a valid secular purpose, therefore, is not a problem.

*B. Principal or Primary Effect that Neither
Advances nor Inhibits Religion*

Despite a deceptively simple formulation, the primary-effect prong of the *Lemon* test has proved difficult to apply. Several variations have emerged. Justice Douglas, concurring in the Prayer Cases, suggested that any provision of state aid to religious organizations would violate the establishment clause.⁹⁵ This cannot be correct.⁹⁶ Broadly construed, a ban on any financial contribution by the state to religious organizations would forbid the provision of police, fire, and other governmental services to churches and parochial schools, practices that are universally conceded to be valid.⁹⁷

Justice Blackmun proposed a two part inquiry in assessing the primary effect of a state subsidy to private colleges that was challenged in *Roemer v. Board of Public Works*.⁹⁸ “[*Hunt v. McNair*] requires (1) that no state aid at all go to institutions that are so ‘pervasively sectarian’ that secular activities cannot be separated from sectarian

94. *Walz* involved a constitutional provision and an implementing statute that extended “property tax exemptions to religious organizations for religious properties used solely for religious worship.” *Id.* at 666. The program involved in *Walz* will receive greater attention in Section C, which analyzes entanglement. See *infra* notes 131-35 and accompanying text.

95. Justice Douglas, concurring in *Schempp*, stated:

But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. . . . Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause.

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 229-30 (1963) (Douglas, J., concurring); see also *Engel v. Vitale*, 370 U.S. 421, 436 (1963) (Douglas, J., concurring) (“The point for decision is whether the Government can constitutionally finance a religious exercise.”)

96. “One fixed principle in this field is our consistent rejection of the argument that any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause.” *Mueller v. Allen*, 103 S. Ct. 3062, 3065 (1983).

97. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947). The Court noted that “Parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. . . . But such is obviously not the purpose of the First Amendment.” *Id.* Indeed, state financial support need not be a necessary condition of an establishment clause violation. In *Stone v. Graham*, the Court invalidated a statute requiring the posting of the Ten Commandments in public school classrooms notwithstanding that private contributions provided the necessary funds. 449 U.S. 39, 42 (1980). “It does not matter that the posted copies . . . are financed by voluntary private contributions, for the mere copies under the auspices of the legislature provides the ‘official support of the State . . . Government’ that the Establishment Clause prohibits.” *Id.* (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963)).

98. 426 U.S. 736 (1976).

ones, and (2) that if secular activities *can* be separated out, they alone may be funded.”⁹⁹ This inquiry combines two analyses that various members of the Court have applied to the question of state subsidies to private schools and colleges. Sometimes, the Court has found an impermissible effect because of the religious character of the aided instructions. For example, in *Meek v. Pittenger*,¹⁰⁰ the Court invalidated a state-financed direct loan of instructional materials to nonpublic schools because of the “religion-pervasive” character of the schools involved; 75% of the *beneficiaries of the loans* were church-related or religiously affiliated.¹⁰¹ In his dissenting opinion, Justice Rehnquist criticized the Court for “measuring the ‘effect’ of a law by the percentage of sectarian schools benefitted.”¹⁰² His dissent demonstrated the perspectival nature of percentages. Relying on a proposition advanced in the majority opinion, Justice Rehnquist maintained that the separate laws authorizing aid to public and private schools should be read together. Viewing the state educational program in its entirety, then students at religious schools would constitute only a small percentage of the beneficiaries of state assistance.¹⁰³

At other times, the Court has focused on the nature of the aid granted and on whether the state is funding the secular or the religious portion of the sectarian educational program. The Court’s effort in *Wolman v. Walter*¹⁰⁴ to distinguish state-provided transportation to and from school, which it had upheld in *Everson v. Board of Education*,¹⁰⁵ from state-provided transportation for field trips, which it intended to invalidate in *Wolman*, provides a particularly good example of this kind of analysis:

The critical factors [in *Everson*] . . . are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided [Here] the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution,

99. *Id.* at 755 (emphasis added).

100. 421 U.S. 349 (1975).

101. *Id.* at 364, 366.

102. *Id.* at 388-89 (Rehnquist, J., dissenting) (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 804 (1973) (Burger, C.J., concurring in part and dissenting in part)).

103. *Id.* at 389 (Rehnquist, J. dissenting). Justice Rehnquist observed that less than 19% of all students in the state attended sectarian schools. *Id.* at 390 n.3.

104. 433 U.S. 229 (1977).

105. 330 U.S. 1 (1947).

an unacceptable risk of fostering of religion is an inevitable byproduct.¹⁰⁶

The dichotomy between secular and religious aspects of sectarian education, however, is illusory. Little economic insight is needed to realize that subsidizing one area of the school operations frees funds for use in other areas. In terms of the *effect* of the state aid, therefore, only a slight difference exists between subsidizing the secular aspects of the parochial school program and directly subsidizing its religious aspects.¹⁰⁷

Neither of the preceding primary effect analyses is particularly satisfying. Focusing on the religious or nonreligious character of the aided instructions suffers from the somewhat arbitrary and perspectival nature of percentages. And the distinction between the secular and religious characteristics of a sectarian school is of little practical significance. The decision in *Widmar v. Vincent*,¹⁰⁸ though, may provide a more cogent alternative.

The coercive effect of officially-sanctioned religion has been identified as the predominant problem in establishment clause questions raised by religious activity in the public schools.¹⁰⁹ *Widmar* responded to that problem by concluding that state provision of a forum open to all forms of communication, including religious communication, "does not confer any imprimatur of State approval on religious sects or practices."¹¹⁰ As the Supreme Court apparently recognized in

106. *Wolman*, 433 U.S. at 253-54. In *Meek v. Pittenger*, the Court upheld a textbook loan program, but invalidated a direct loan of instructional materials and equipment to nonpublic schools. 421 U.S. 349 (1975). This somewhat mystifying distinction arose because the decisions to validate one program and invalidate the other commanded different majorities of the Court. See also *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 654-57 (1980) (upheld state reimbursement of nonpublic school expenditures in administering and grading standardized tests because the nonpublic schools had no control over the content or outcome of the tests, and therefore, no substantial risk existed that the examinations would be used for religious purposes).

107. Cf. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 666-67 (1980) (Blackmun, Brennan and Marshall, J.J., dissenting) ("[S]ubstantial direct financial aid to a religious school, even though ostensibly for secular purposes, runs the great risk of furthering the religious mission of the school as a whole because that religious mission so pervades the functioning of the school." *Id.* But see *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968). "[W]e cannot agree . . . 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 to students by the public are in fact instrumental in the teaching of religion.") A situation could arise in which private religious schools would not provide particular materials or services without state funding. In most cases, however, either because of state-mandated requirements or because of the needs and desires of parents and pupils, the parochial school would be obliged to provide the subsidized service in any event, making possible a substitution of funds.

108. 454 U.S. 263 (1981); see *supra* notes 63-68 and accompanying text.

109. See *supra* notes 20-28, 41-43, 49-52 and accompanying texts.

110. *Widmar*, 454 U.S. at 274; see *supra* notes 66-68 and accompanying text.

Mueller v. Allen,¹¹¹ the same should be true outside the public school context, when the state provides funds or services to nonpublic schools, including religious schools. As long as the state does not discriminate among the recipients of its assistance on the basis of the religious content of their educational programs, state funding or aid to nonpublic schools should survive an establishment clause challenge, even though religious institutions are included among the beneficiaries.¹¹²

Within the confines of the public school, the "imprimatur of State approval" is absent when students voluntarily initiate religious activity in response to state support of all kinds of student activity.¹¹³ Likewise, courts should deem absent the state's imprimatur when parents and pupils can choose voluntarily among a variety of educational programs, including religious alternatives, that are made possible by state funding. The state, however, cannot restrict the field or condition its assistance on the basis of the religious content of the programs it supports.¹¹⁴ At most this means that the state should be allowed to spend up to the amount that it spends on each pupil in its public schools to provide individual students with nonpublic alternatives. Allowing the state to exceed this amount runs the risk of favoring religious education over nonreligious alternatives.

111. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent* . . . where we concluded that the state's provision of a forum neutrally "open to a broad class of religious speakers does not confer any imprimatur of State approval," so here: "the provision of benefits to so broad a spectrum of groups is an important index of secular effect."

103. S. Ct. 3062, 3068 (1983).

112. See Kurland, *supra* note 14, at 5; see *supra* notes 14, 28 and accompanying texts.

113. See *supra* notes 49-51 and accompanying text.

114. The *Mueller* Court relied on an argument made elsewhere by Chief Justice Burger that state aid to parents poses fewer establishment clause problems than direct state aid to religious schools: "Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval' . . . can be deemed to have been conferred on any particular religion or on religion generally." *Mueller*, 103 S. Ct. at 3069. In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, the Chief Justice argued the following:

It is admittedly difficult to articulate the reasons why a State should be permitted to reimburse parents of private school children . . . when a State is not allowed to pay the same benefit directly to sectarian schools on a per-pupil basis. In either case, the private individual makes the ultimate decision that may indirectly benefit church-sponsored schools; to that extent, the state involvement with religion is substantially attenuated. The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families.

413 U.S. 756, 802 (1973) (Burger, C. J., concurring in part and dissenting in part). The decisive factor, however, is not that the assistance is extended formally to parents rather than to the

The *Widmar* opinion, however, left open the possibility that "empirical evidence that religious groups will dominate [the school's] open forum"¹¹⁵ might be relevant to establishment clause analysis.¹¹⁶ As a practical matter, though, the greatest share of state educational expenditures will go to public schools.¹¹⁷ Further, Justice Rehnquist's majority opinion in *Mueller* declined the invitation to indulge in the statistical analysis seemingly left open by *Widmar*.¹¹⁸ This refusal was quite proper. Just as in the public school context, the establishment clause problem is eliminated when individuals voluntarily initiate activity or voluntarily choose among options made possible by the state. As long as the state does not restrict the possible alternatives, the actual activities or options that individuals choose should have no bearing on the establishment question.¹¹⁹

C. Excessive Government Entanglement with Religion

The final prong of the *Lemon* test is that the state cannot "foster an excessive entanglement with religion."¹²⁰ This means that governmental activity must not "involve the State 'so significantly and directly

schools, but that parents can choose among a variety of options that is unrestricted by the state. See *Wolman v. Walter*, 433 U.S. 229, 249-51 (1977) ("it would exalt form over substance" to allow the fact that the offending instructional materials were loaned to pupils rather than to the school itself to cause a different result than that in *Meek*, which invalidated a direct loan of instructional materials to nonpublic schools); *Nyquist*, 413 U.S. at 780-85, 791 (the fact that the challenged tuition reimbursements and tax credits were channelled to parents rather than to the schools was not controlling).

115. *Widmar v. Vincent*, 454 U.S. 263, 275 (1981); see *supra* note 68.

116. *Mueller v. Allen*, 103 S. Ct. 3062, 3068 n.7 (1983).

117. In invalidating a tuition reimbursement program, the *Nyquist* majority distinguished *Allen* and *Everson* because in those cases "the class of beneficiaries included *all* school children, those in public as well as private schools." 413 U.S. at 782 n.38. The tuition grants, by contrast, "are given in addition to the right that [parents] have to send their children to public schools 'totally at state expense.' And in any event, the argument [that tuition grants provide comparable benefits to all parents of school children whether enrolled in public or nonpublic schools] 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." *Id.* Asserting, however, that the state extends tuition grants in addition to the right to send children to public schools is meaningless; as a matter of necessity, parents must elect one alternative or the other and cannot enjoy both. The state expenditures on public education therefore must be considered in assessing the relative impact of its expenditures on nonpublic alternatives.

118. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Mueller, 103 S. Ct. at 3070.

119. See *id.* "[T]he fact that private persons fail . . . to claim the tax relief to which they are entitled—under a facially neutral statute—should be of no consequence in determining the constitutionality of the statute permitting such relief." *Id.*

120. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom.”¹²¹ State programs that survive the purpose and effect inquiries detailed above, however, should not pose this danger. While the state may impose minimum educational standards and economic criteria that will require the state to monitor the various schools to ensure compliance, this monitoring will be the same for all groups involved regardless of the religious or nonreligious nature of their activities.¹²² Rigid surveillance to ensure that nonpublic school personnel play a strictly nonideological role or that state funds are used only for secular purposes is not required.¹²³ Characterizing and resolving the primary effect question in the way suggested above¹²⁴ has obviated the need for this kind of entangling monitoring, because the focus of the inquiry is shifted from the religious or nonreligious content of the recipient’s institutions or activities to the neutrality or uniformity with which the state dispenses aid. Under the approach developed here, therefore, entanglement is not an issue.

This conclusion suggests a more general criticism of the entanglement inquiry. No matter how the primary effect issue is addressed, resolving that issue necessarily resolves the entanglement question as well.¹²⁵ Each time the Supreme Court has examined both primary effect and entanglement in reference to a particular program, it has resolved the two issues the same way.¹²⁶ Justice Blackmun’s opinion in *Roemer*

121. *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg and Harlan, J.J., concurring)).

122. When faced with an annual subsidy to private colleges requiring annual verification, Justice Blackmun wrote this: “[C]ontacts between the [Maryland Council for Higher Education] and the colleges are not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges’ accreditations by the state.” *Roemer v. Board of Pub. Works*, 426 U.S. 736, 763-64 (1976).

123. See *Lemon v. Kurtzman*, 403 U.S. 602, 620-21 (1971) (“The very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state.”) The *Lemon* Court found entanglement in the need for annual audits to determine how much of the total expenditure was attributable to secular education and how much to religious activity. *Id.* at 620.

124. See *supra* notes 108-19 and accompanying text.

125. Justice White, dissenting in *Lemon*, argued the following:

The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the “no entanglement” aspect of the Court’s Establishment Clause jurisprudence.”

Lemon v. Kurtzman, 403 U.S. 602, 668 (1971). (White, J., dissenting).

126. See, e.g., *Mueller v. Allen*, 103 S. Ct. 3062 (1983) (Minnesota tax deduction satisfies primary effect test and is not entangling); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (reimbursing parochial schools for administering standardized tests has primarily a secular effect and suggests no excessive entanglement); *Wolman v. Walter*, 433 U.S. 229 (1977) (provision of diagnostic services on nonpublic school premises creates no

*v. Board of Public Works*¹²⁷ provides a particularly good example of this parallelism.

In *Roemer*, Justice Blackmun held that a Maryland subsidy of private colleges did not have a primary effect of advancing religion. He based his conclusion on a finding that the colleges involved were not "pervasively sectarian."¹²⁸ He again focused on the character of the aided institutions to support his conclusion that the Maryland scheme did not foster excessive entanglement: "The finding that the colleges perform an essentially secular function is also important for purposes of the entanglement test because it means that secular activities, for the most part, can be taken at face value. . . . The need for close surveillance of purportedly secular activities is correspondingly reduced."¹²⁹ This prompted Justice White's criticism that the *Roemer* Court had left unclear the status of entanglement as a separate test. Justice White observed, "It is not clear that the 'weight and contours of entanglement as a separate constitutional criterion' . . . are any more settled now than when they first surfaced. Today's plurality opinion leaves the impression that the criterion really may not be 'separate' at all."¹³⁰

Justice White's criticism is well taken. Analyzing entanglement adds nothing that cannot be uncovered by properly addressing the primary effect inquiry. If the requisite illicit primary effect is present, no need exists to examine entanglement; if that effect is not present, however, the state need not engage in monitoring or surveillance activities that create a risk of entanglement.

This can be illustrated by analyzing *Walz v. Tax Commission*,¹³¹ a 1970 case which upheld a New York property tax exemption granted to religious organizations for properties used exclusively for religious purposes. Chief Justice Burger's majority opinion scarcely mentioned the primary effect of the exemption, but the Court concluded that

impermissible risk of fostering ideological views and will not lead to entanglement; therapeutic, remedial, and guidance services provided by public employees away from nonpublic school premises will not have an impermissible primary effect and will not lead to entanglement; provision of field trip transportation has impermissible primary effect and would involve excessive entanglement); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (aiding private colleges does not have primary effect of advancing religion and does not foster excessive entanglement). In two cases, however, the Court rested its decision exclusively on an examination of entanglement, without considering the primary effect of the statutes involved. See *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970).

127. 426 U.S. 736 (1976).

128. *Id.* at 755-59.

129. *Id.* at 762.

130. *Id.* at 769 (White and Rehnquist, J.J., concurring) (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 822 (1973) (White and Rehnquist, J.J., Burger, C.J., dissenting)).

131. 397 U.S. 664 (1970).

the exemption did not foster an excessive entanglement between church and state.¹³² If *Walz* stands for the proposition that the state may grant a tax exemption to various groups, including religious groups, who perform certain services, such as maintaining a hospital or library, without violating the establishment clause,¹³³ then the primary effect analysis set out above¹³⁴ would suggest that the case was decided correctly. By granting the exemption, the state merely makes a general benefit available to various groups without regard to the religious or nonreligious nature of their activities. A discussion of entanglement is not necessary to reach this result. But if, as is more likely, *Walz* upheld a tax exemption that was tailored specifically to benefit religious organizations,¹³⁵ then the preceding analysis would suggest that the case was decided incorrectly. Once again, discussing entanglement is unnecessary to the analysis.

In sum, analyzing entanglement between church and state adds nothing to the primary effect analysis detailed earlier. This is particularly true if the approach advocated in this article is adopted. In fact, this may be generally true no matter how the primary effect question is addressed.

CONCLUSION

The cases dealing with religious activity in the public schools may provide a way to resolve the uncertainty over permissible state aid to religious schools. The problem presented in the public schools is that the state risks officially sanctioning religion or particular religious activity. That problem is not present, however, when the state merely permits individuals to initiate religious activities voluntarily by furnishing its facilities for all groups and activities.

Similar principles should govern state funding of religious education. In assessing the primary effect of such efforts, courts should ask whether the state is merely making its resources uniformly available to all groups without regard to the religious content of their educational activities. If the state expends greater resources in aiding religious

132. *Id.* at 674-76.

133. *See id.* at 697 (opinion of Harlan, J.) ("To the extent that religious institutions sponsor the secular activities that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions.")

134. *See supra* notes 108-19 and accompanying text.

135. *See Walz*, 397 U.S. at 674 ("We find it unnecessary to justify the tax exemption on the social welfare service or 'good works' that some churches perform for parishioners and others . . .").

educators than it uses per capita in its public schools or if it discriminates among recipients on religious lines, then the legislation at issue should be invalidated. This appears to be the approach taken by the Supreme Court in *Mueller v. Allen*. *Mueller*, therefore, may present an opportunity to introduce some rationality into this area. While a limited inquiry into legislative purpose would be in order, an analysis of entanglement adds nothing to the primary effect inquiry and should be discarded.