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The controversy continues.

Mueller v. Allen: A New Direction in the Public School- Private School Controversy

by Robert M. Craig

Religion has always had an important place in America's history, culture, and institutions. The growth of schooling, one of the nation's most important institutions, has been strongly influenced by sectarian concerns. The relationship between religion and schooling, while contributing to our heritage, has also created extensive controversy. During the last forty years this controversy has given rise to much litigation in the federal court system of the United States. In 1983 the Supreme Court added fuel to this controversial fire in its decision in **Mueller v. Allen**. The Supreme Court's rendering in Mueller will be remembered for the Court's approval of the legality of a Minnesota statute allowing tax deductions for transportation, textbooks, and tuition to parents sending their children to sectarian schools. The Mueller decision represents a new direction in the Supreme Court's attitude toward public and private schooling.

Background

Religious issues in the public schools center primarily on the Establishment and Free Exercise clauses in the First Amendment to the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In this short statement our religious guarantees are set forth. It was not until 1947 in **Everson v. Board of Education**, however, that the Supreme Court held that the Establishment Clause applied to the states, through judicial incorporation of the Establishment Clause with the Fourteenth Amendment. Seven years prior to the Everson decision, the Free Exercise Clause was held to ap-

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ply to the states in **Cantwell v. Connecticut**. As church-state litigation grew, the Court sought to systematize and standardize a set of rules upon which to judge such cases.

In companion cases in 1963 (**Abbington School District v. Shempp** and **Murray v. Curlett**) the Supreme Court made an attempt to establish a set of rules or a test with which to judge cases involving religion and public schooling. Delivering the opinion of the Supreme Court, Justice Clark stated that in issues involving First Amendment religious guarantees the Court must consider "what are the purpose and the primary effect of the enactment? If either is the advancement or the inhibition of religion, then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution." In 1970, a third test was added to the purpose and primary effect test. In **Walz v. Tax Commission**, the Court's third test was stated as follows, "We must also be sure that the end result—the effect—is not an excessive governmental entanglement with religion." The three tests were consolidated and evoked one year later by Chief Justice Burger in **Lemon v. Kurtzman**. Since 1971, the three-prong test has been used to judge church-state issues before the Court.

The three-prong test has been criticized since its inception. Some of the more valid criticisms assert that the Lemon test has "not produced coherence" (Manning, 1981), "has led to sheer ad-hoc determination of law-judgments" (Stevens, 1980) and that "the Court's efforts have failed to meet both the practical and theoretical goals of constitutional adjudication" (Gray, 1981). More specific to the concerns of this review are Justice Renquist's comments in regards to the three-prong test: "We can only dimly perceive the lines of demarcation in this ordinarily sensitive area of constitutional law . . . while the principle [the three-prong test] is well settled, our cases have also emphasized that it provides no more than a helpful sign post . . ."

While the Mueller decision does not represent a complete abandonment of the Lemon test, it seriously undermines its intent. Indeed, Justice Renquist uses the test in delivering the majority opinion of the Court in Mueller. It is his interpretation of the facts of the case with the three-prong test that leaves one in wonder as to why the test was used at all. The majority opinion of the court may have more to do with the prevailing social and political mood of the justices than with a clearly articulated theoretical foundation of the law.

The Case

The statute under examination is a Minnesota law allowing state taxpayers, in computing their state income tax, to deduct expenses incurred in providing textbooks, transportation, and tuition for all children attending elementary and secondary schools. The main beneficiaries of the tax deduction plan were parents who sent their children to religious schools, as 95 percent of those attending private schools attended sectarian schools. Minnesota's public schools are generally prohibited by law from charging tuition. Only 79 students out of 900,000 public school students in Minnesota, during the 1978-79 school year, were eligible for the tax credits.

In spite of the revealing statistical evidence, the majority opinion of the Court reasoned that the Minnesota statute had a secular religious purpose. "An educated populace," said Justice Renquist, "is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising costs of educational expenses plainly serves this secular purpose" In

delivering the majority opinion of the Court, Justice Renquist reasoned that by educating a growing number of school age children private schools will reduce the taxpayers' burden for financing public schooling. In addition, private schools may possibly serve as a "benchmark" for public school emulation, Renquist said. It is difficult to see how tax deductions to parents of parochial school students, which cause funds to flow from a state's treasury, can provide for the reduction of tax burdens.

Next the Court took up the question of the primary effect of the Minnesota statute. Reasoning that the Minnesota statute provided for only several of many deductions, the Court asserted that it thus helped to equalize the tax burden of the citizens of the state. More importantly, said Renquist, the deductions were available to *all* parents of elementary and secondary students in the state, providing assistance to a broad spectrum of Minnesota citizens. The dissenters to Renquist's assertions on the primary-effect point note that only in the rarest of cases are parents of public school students required to pay tuition for school enrollment in Minnesota. Also argued is the fact that 95 percent of private school students attend some form of sectarian school; thus the clear intent of the law is directed towards financial relief to sectarian schools.

Finally the Court moved on to the third prong of the Lemon test. In addressing this point, the Court found no evidence of excessive governmental entanglement. The only governmental involvement found was in regard to questions as to whether particular textbooks qualify for deduction. State officials could reasonably question whether particular books were or were not secular in nature, disallowing any deduction for textbooks used to foster any particular religion.

Conclusions

The Mueller decision has debased the importance of

the three-prong test as a controlling precedent in church-state issues. By calling the test no more than a "helpful signpost," Justice Renquist was able to construe the facts of the case to meet some sort of social or political agenda.

Using previous decisions in concert with the Mueller decision, it is impossible to build a theoretical base from the use of the three-prong test. What we have then is a series of decisions based upon the nuances and specifics of particular statutes, judged by a particular configuration and collective disposition of justices' opinions.

Tuition tax credits, educational voucher plans and other such alternative financial patterns for parents of private school students have been advocated for some time. In the face of unparalleled criticism of the public schools such plans grow even more attractive. Notwithstanding the criticism of such plans—ones which center around the possibility of fraud, racial discrimination, cost, economic segregation—the impact on the public schools and the church-state issue, the Court ruled in favor of the Minnesota plan. The obstacles to a tuition tax deduction plan were overcome by the Court in what can be considered a political and social statement as to the perceived current condition of compulsory public schooling rather than by the logic of judicial inquiry.

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