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I. Introduction

At the close of its last term, the United States Supreme Court announced its opinion in *Mueller v. Allen*,[1] in which the Court decided that a Minnesota taxing scheme which allows parents to deduct certain expenses incurred in educating their children, including parochial school tuition, does not violate the Establishment Clause[2] of the First Amendment. The five member majority[3] failed to acknowledge that its holding radically departs from precedent and violates the fundamental principle that public monies should not be used to support religious activities or institutions. Consequently, the Mueller opinion appears to be intellectually dishonest and adds further confusion to this already unclear area of the law.

Of more immediate concern is the effect *Mueller* could have on American education. If *Mueller* opens the way to the passage of a federal program of tuition tax deductions, as some believe it will,[4] the impact on our public and private education systems will be disastrous.

II. The *Mueller* Decision and Establishment Clause Principles

The Burger Court has developed a three-part test for dealing

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

2. The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." U.S. Const., amend. I.

3. Justice Rehnquist wrote the majority opinion, and was joined by Chief Justice Burger and Justices White, Powell, and O'Conner.

Justice Marshall wrote a dissenting opinion in which Justices Brennan, Blackmun, and Stevens joined.

4. For a prediction of the effect that a ruling in favor of the constitutionality of tax credits could have on Congress, see the discussion by Emerson Elliot, who was integrally involved in the development of the Reagan Administration's education consolidation bill, and Rick Jerue, Executive Director of the National Commission on Student Financial Assistance found in League of Women Voters Education Fund, *School Finance in the 1980's*, 32 (1982).

with Establishment Clause challenges:[5]

> First the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion. . .; finally, the statute must not foster 'an excessive government entanglement with religion.'[6]

While all members of the Court agree on the articulation of the test, they have been far from unanimous on the results of its application in cases involving state or federal governmental assistance to sectarian schools.[7] An examination of the cases preceding *Mueller,* however, reveals several points of agreement.

First, government aid to sectarian schools is not *per se* unconstitutional.[8] Because these schools perform secular as well as religious functions, governmental monies may be used to assist them in performing these secular functions.[9]

Second, aid programs of a non-educational nature, such as school lunch programs, are usually permissible even in parochial schools because schools are a convenient vehicle for administering such programs, which are generally neutral in effect.[10] Nevertheless,

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5. Most Establishment Clause cases have concerned schools and can be grouped into two categories: (1) those involving religious exercises or training in the public schools and (2) those involving aid to parochial schools. Mueller v. Allen, of course, falls into the latter category. During the Burger years a number of cases involving aid to sectarian schools have been decided. *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Levitt v. Committee for Public Educ., 413 U.S. 472 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977); Committee for Public Educ. v. Regan, 444 U.S. 646 (1980); and Mueller v. Allen, 103 S. Ct. 3062 (1982).

Only two major cases were decided before the Burger years. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

Thus, the Burger Court, more than any other, has developed the law surrounding the Establishment Clause as it relates to state aid to parochial schools.

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

7. Gerald Gunther wrote in 1980, "Typically, then, the modern Court divides 3 to 3 to 3 in this area: at the most permissive extreme are Justices White and Rehnquist, often joined by Chief Justice Burger; at the most restrictive end of the spectrum are Justices Stevens, Brennan and Marshall; in the middle are Justices Blackmun, Powell and Stewart". G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1568 (10th ed. 1980) (citing Meek v. Pittenger, 421 U.S. 349 (1975)). In *Mueller,* Justice O'Connor, who in 1981 replaced Justice Stewart on the Court, voted with the "permissive" majority as did Justice Powell. Justice Blackmun joined the "restrictive" members in dissent. *See supra* note 3.

8. "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, 3065-66 (1983).

9. There is also a viable and widely subscribed to theory that any aid to a parochial school violates the Establishment Clause, a theory not without substantial historical support. *See, e.g.,* Committee for Public Educ. v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (Jackson, J., dissenting).

10. Justice Marshall has suggested that the line between acceptable and unacceptable forms of aid "should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance." Wolman v. Walter, 433 U.S. 229, 259 (1977) (Marshall, J., concurring in part and dissenting in part).

the articulation of a general welfare purpose is not sufficient justification for avoiding a careful analysis of the program and its effects by the Court.[11]

Third, governmental programs which aid a school's educational functions must be carefully examined to ensure that the assistance is of such a nature that it cannot be used, even unintentionally, in furtherance of the school's religious mission. Aid consisting of money or materials, which could be used for religious pursuits, creates an impermissible risk of fostering ideological views. Because this aid has a potential "religious effect", it is therefore unconstitutional.[12]

Finally, the form of the aid, whether direct (to the school) or indirect (to the student or his parents), has no bearing on the determination of whether the aid will have an impermissible religious effect.[13]

In short, a majority of the Court, before the *Mueller* decision, agreed on one overriding principle: Government aid that is certain to have the effect of furthering *only* the secular function of the school may be constitutional,[14] but government aid that is either unrestricted or capable of being converted to religious purposes is unconstitutional.[15] In the *Mueller* decision, however, the Court did not adhere to this heretofore cardinal rule. With *Mueller,* as one lawyer put it, the law of church and state appears to be coming

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11. Thus, in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court found that aid for maintenance and repairs to ensure the "health, welfare and safety of children" was unconstitutional because it was not and could not be restricted to buildings used only for secular purposes.

12. For a detailed illustration of the Court's application of these principles to an aid plan, see Wolman v. Walter, 433 U.S. 229 (1977).

13. In discussing whether a loan to students of certain educational materials would fare any better than a direct loan *to a school* of similar materials (previously found unconstitutional), Justice Blackmun, writing for the Court, stated: "Despite the technical change in legal bailee, the program in substance is the same as before. . .the state aid inevitably flows in part in support of the religious role of the schools." Wolman v. Walter, 433 U.S. 229, 250 (1977). The form, however, might have a bearing on the question of entanglement, which the Court has designated as the third prong of its test in order to guard against either or both of two results' excessive governmental monitoring of religious institutions and/or potential political divisiveness of appropriation grants to or for parochial schools. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

14. Some aid programs might be found to further only secular ends but then be struck on the grounds of entanglement because they involve the state in excessive monitoring of the religious entity. *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971).

15. The one exceptional situation is in the loan of textbooks to parochial school students. Undoubtedly, books could be used to further the religious function of the school in violation of principle three. *See* text accompanying note 5. Nevertheless, the Court continues to allow such programs principally because of *stare decisis.* Such loan programs were initially approved in the pre-Burger Court decision of Board of Educ. v. Allen, 392 U.S. 236 (1968), and, while some Justices would overrule *Allen,* a majority has decided not to do so. Undoubtedly the Court recognizes that a reversal of *Allen* now would work a substantial financial hardship on sectarian schools.

For the differing views, compare Blackmun's opinion (for the Court) at 236-38 and Marshall's opinion (concurring in part and dissenting in part) at 256-60 in Wolman v. Walter, 433 U.S. 229 (1977).

"unravelled".[16]

The statutory scheme at issue in *Mueller* was not complex: Minnesota's state income tax program allowed all taxpayers to deduct expenses incurred in providing tuition, textbooks, and transportation for their children attending elementary or secondary school.[17] Minnesota taxpayers challenged the statute on two grounds. First, the program was constitutionally indistinguishable from the New York program of tax benefits struck down in *Committee for Public Education v. Nyquist*.[18] Second, since the program primarily benefited parents whose children attended sectarian schools, it had an impermissible religious effect in violation of part two of the Establishment test.[19] A majority of the Court did not agree with these contentions.

Justice Rehnquist, writing for the majority, stated that reliance on *Nyquist* was misplaced because the facts were distinguishable: Minnesota's program of "genuine tax deductions"[20] benefiting "all parents"[21] was considerably different from the New York program, which benefited only parents whose children attended "*nonpublic* schools."[22] Since *Nyquist* was not controlling, he continued, it was incumbent on the Court to determine if Minnesota's statute had a religious effect. Acknowledging that the "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children",[23] he nevertheless found the indirectness of the aid significant, and asserted that "the attenuated financial benefit" that "ultimately flows to parochial schools from the neutrally available tax benefit at issue" is not the kind of state aid which the "historic purposes" of the Establishment Clause were intended to prohibit.[24] Nor would the Court find, he concluded, that the primary beneficiaries of this tax law were necessarily sectarian schools, even though the evidence showed that at the time of trial ninety-five percent of the children attending tuition-charging schools were attending sectarian schools:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent

16. Charles S. Sims, attorney for the American Civil Liberties Union, as quoted in Barkash, *Court Faces Issues Crucial to '84 Race*, The Washington Post, Oct. 2, 1983, A-1, A-10. Sims' remark referred to *Mueller* and to Marsh v. Chambers, 103 S. Ct. 3330 (1983). *Marsh* concerned the use of state (Nebraska) funds for hiring a chaplain for the legislature.
17. MINN. STAT. § 290.09 (22) (1982).
18. 413 U.S. 756 (1973).
19. *See* text accompanying note 5.
20. *Mueller*, 103 S. Ct. at 3067-68 n.6.
21. *Id.* at 3068.
22. *Id.* (emphasis in original).
23. *Id.* at 3069.
24. *Id.*

> 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.[25]

The Court's analysis is unconvincing. Neither indirectness[26] nor facial neutrality[27] had previously shielded state assistance programs from a finding of unconstitutionality. One must ignore reality to conclude that tax deductions for elementary and secondary school tuition will not inure primarily to the benefit of religious institutions for very few public schools charge tuition and very few private schools at the elementary or secondary level are nonsectarian.[28]

Nor is the Court's distinction of *Nyquist* convincing. An examination of that case reveals that the *Nyquist* Court's central concern was not equal treatment of taxpayers or the form of the benefits.[29] Instead, the Court focused on a different issue that has been central in every school aid decision, and which the *Mueller* Court remarkably did not address: Is the governmental aid, whether direct or indirect, conditioned upon use "exclusively for secular, neutral, and nonideological purposes?"

The answer is obvious: The aid generated by tax deductions is not only not channeled to advance merely the secular purposes of a school, but such aid is directly proportional to the sum spent for the costs of the secular and religious educations combined, and may increase even if only the cost of the religious education increases. The majority avoided this issue altogether, for the recognition of this fact would have compelled one of two results—either a holding of unconstitutionality or a departure from *Nyquist* and other precedents—results from which these five justices who favor both aid to

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25. *Id.* at 3070.

26. Thus, in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), grants to parents did not constrain the Court from finding "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783 (footnote omitted). Furthermore, in Wolman v. Walter, 433 U.S. 229 (1977), when considering a loan of materials to children rather than schools, the Court stated: "Appellees seek to avoid *Meek* [v. Pittenger, 421 U.S. 349 (1975)] by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." *Id.* at 250. (citation supplied). *See also supra* note 12 and accompanying text.

27. Although equal treatment of public school children has been a first concern of the Court and facial neutrality is a requirement of permissible aid statutes, some attempts to render equal aid to nonpublic schools have been struck when the Court was not certain the aid would be used only for secular purposes. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977).

28. In 1978, 5,084,000 children attended private schools in the United States. Of those, only 747,000 or 12% attended non-sectarian schools. U.S. Bureau of the Census, *Statistical Abstract of the United States 1981* (102nd Ed.) at 148 (Table 244).

29. Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

parochial school and strict adherence to *stare decisis*[30] apparently did not want to choose. The result, nevertheless, is the latter:

> For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion. As the Court. . .has often repeated, 'No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion'.[31]

III. The Ramifications of the Mueller Decision for Private & Public Education

Since the election of Ronald Reagan, there has been a move in Congress to allow federal income tax deductions for private school tuition.[32] The American educational system as we know it—a system of quality public schools in healthy competition with independent private schools—would be severely harmed by the passage of such a program.

A. The Effect on Public Schools

Today, because of declining birth rates, the American public school system is facing a problem which it has not had to face

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30. The votes of the Chief Justice and Justices Rehnquist and White could have been predicted with near certainty. *See supra* note 6. Justice O'Connor who had not previously participated in such cases, nevertheless, has in other cases shared ideological views somewhat in line with the Chief Justice and Justice Rehnquist and thus her vote was not a surprise. Justice Powell was, therefore, the "swing vote." One cannot help but note that Justice Rehnquist's opinion relies heavily on quotations from prior opinions by Justice Powell, perhaps in an effort to sway his vote. One can only speculate that Powell, a member of the Richmond School Board for a number of years, was influenced by the reasons he stated in Wolman v. Walter, 433 U.S. 229 (1977). "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools." *Id.* at 262 (Powell, J., concurring in part and dissenting in part). The Burger Court has often been characterized as an adherent to *stare decisis. See, e.g.*, V. BLASI, THE BURGER COURT—THE COUNTER REVOLUTION THAT WASN'T (1983).

31. *Mueller*, 103 S. Ct. at 3078 (Justice Marshall joined by Justices Brennan, Blackmun, and Stevens, dissenting) (citations omitted).

32. The Reagan Administration has been a proponent of such deductions. *See*, State of the Union Address, 19 WEEKLY COMP. PRES. DOC. 105, 109 (Jan. 31, 1983). This position caused Rick Jerue, Executive Director of the National Commission on Student Financial Assistance to comment: "I find it highly ironic, however, that an administration that is talking about cutting federal education aid by 25 percent at the same time would propose a $5 billion spending program for tuition tax credits. But, strange things happen." League of Women Voters Education Fund, *School Finance in the 1980's* 32 (1982).

before—declining enrollments.[33] While in the past the central concern of many of the nation's school boards was how to deal with growth, the most pressing problem of the 80's is how to deal with a reduced student population. At first blush, this may seem to be a simple problem but in an era of increasing fixed costs[34] and state and federal funds which are allotted on a *per capita* basis, local school boards are caught in a budget squeeze. Fewer students are not necessarily less expensive to educate. Furthermore, decisions to close schools, fire teachers, and reduce programs are neither popular nor easy.

The public schools face a second and far more serious problem—a shrinking political constituency. At one time, a majority of the populace had a personal connection with the community school. Today that majority has shrunk to a minority, due in part to the decreasing school population but also exacerbated by the increased mobility of the American family,[35] the increase in single-parent households,[36] and the breakdown of the extended family.[37] While it does not necessarily follow that the lack of a personal tie means a lack of interest, the decline in public support for schools is evidenced dramatically by the failure of major bond issues[38] and the failure of education to attract the interest of legislators.[39]

A program of tuition tax deductions will only aggravate these two problems. Even now, as the total school population is declining, the private school population is increasing.[40] Spurred on by tax in-

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33. The number of children in school reached its peak in 1971 and then began to decline, dropping 9.8% by 1980. Elementary and secondary school age populations are now leveling off; higher education will feel the impact of this decline in the 80's. National Center for Education Statistics, *Digest of Education Statistics* 37 (1981).

34. Two major expenditures for schools are transportation and utilities, neither of which is significantly changed by pupil population, and both of which have greatly increased with spiraling energy costs. For example, in 1980-81, the Gettysburg (Pa.) Area School District's expenditure for transportation increased 38% while its pupil population decreased. *Gettysburg Area School District, 1980-81 Budget,* (1980).

35. Forty-seven percent of the population of the United States moved in the period 1965-1970. U.S. Bureau of Census, *Statistical Abstract of the United States* 1981 (102d ed.) at 13 (Table 13). With increased mobility, many Americans no longer live in the community where they went to school and thus that tie is broken.

36. In 1980, less than 77% of all school age children lived with both parents. U.S. Bureau of Census, *Statistical Abstract of the United States 1981* (102d ed.) at 49 (Table 73).

37. This breakdown reduces the number of grandparents who feel a tie to schools.

38. The percentage of major bond issues that gained public approval reached a record low in 1980. The percentage then increased but still is not at former levels. National Center for Education Statistics. *Digest of Ed. Statistics. 1981,* Table 65, 75.

39. "We get a sense that it is becoming increasingly difficult to attract bright, active and ambitious legislators to education. Education committee chairmen are complaining that they cannot get the kind of people they want to include on their committees. Why? Legislators sense education is decreasing in popularity—it is a 'downer' to have to cut education programs. In the 1960's, education was a growth field, but no longer." S. Fuhrman & A. Rosenthal, *Relections on the State Politics of Education* in SCHOOL FINANCE IN THE 1980S (League of Women Voters Education Fund 1982).

40. National Center for Education Statistics, *Digest of Education Statistics* 1981 Table

centives, more families will find private education affordable and withdraw their children from public schools, reducing the present enrollments even further. Especially in cities, upper class whites and, more unfortunately, upper class blacks[41] will abandon the public schools, a phenomenon taking place even now.[42] The impact on the public school's constituency will be even more severe than one of just numbers. An increase in private school subscriptions will, in some measure, "skim off" those parents who have been most active in pushing for solutions to the problems of the public schools.[43] It is ironic, indeed, that the Court which has pushed so hard for an end to the dual school system divided along racial lines[44] has opened the way for a dual school system divided along economic lines.

B. The Effect on Private Schools

Just as the proponents of strong public schools have vigorously lobbied against tuition tax credits,[45] the proponents of private education have actively sought them.[46] While there is no doubt that such a program will give a financial boost to private schools, that boost will not be without its drawbacks. Deductions come with conditions, and such conditions are not always palatable, as was made abundantly clear in *Bob Jones University v. United States* and *Goldsboro Christian Schools, Inc. v. United States*,[47] a decision announced just five weeks before *Mueller*.

In *Bob Jones-Goldsboro*, the corporate petitioners, who operated church-related schools, contested the loss of their tax exempt status[48] and the concurrent loss to their donors of the tax deductibility of their contributions to the schools.[49] The Internal Revenue Ser-

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1, at 6.

41. A major concern of educators has been the lack of black role models for black children. This problem has been advanced as one justification for affirmative action programs. *See, e.g.*, University of California Regents v. Bakke, 438 U.S. 265 (1978). Parents of upper class black children provide such role models.

42. For example, in 1978 in the District of Columbia only 4% of the public school population was white, while approximately 25% of the total population was white. U.S. Bureau of Census, *Statistical Abstract of the United States 1981*, at 32, 47 (Table 36) (102d ed.).

43. Parental interest in education is not a function of economic wealth. However, parents who are better situated economically, especially if the mother is not employed outside the home, are frequently more actively involved with the schools.

44. The Burger Court, beginning with its decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), has prescribed broad and often unpopular remedies to end segregated public school systems like busing.

45. The National School Board Association and the National Education Association are just two of the organizations that have opposed "tuition tax credits."

46. On Nov. 16, 1983, Sen. Robert Dole (R-Kan.) introduced a proposal for a tax credit of 50% of the tuition paid to a qualified private school that met standards prohibiting racial discrimination. The Senate voted to table the measure which was offered as an amendment to a minor tariff bill by a vote of 59-38. 41 CONG. Q. WEEKLY REP. 2424 (Nov. 19, 1983).

47. 103 S. Ct. 2017 (1983).

48. *See* I.R.C. § 501(c)(3) (1954).

49. Section 170 of the Internal Revenue Code of 1954, subsections (a) and (c)(2)(B),

vice had revoked the status because the schools followed racially discriminatory policies. In an unsurprising ruling, the Court upheld the IRS's position. What was surprising about *Bob Jones-Goldsboro,* however, was the Court's opinion, both in its rather curt disposal of the petitioners' free exercise claim[50] and in its broad statements about tax exempt institutions:

> History buttresses logic to make clear that, to warrant exemption under [the Internal Revenue Code], an institution must. . .demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.[51]

One cannot help but be alarmed, as Justice Powell was,[52] by the spectre of "governmental orthodoxy"[53] that this language portends. While in the past federal tax deductions have been used to encourage pluralism and diversity, in the future they could as readily be used to encourage conformity of thought and action.

Thus, those who lobby for the deductibility of private school tuition must be wary of the *Bob Jones-Goldsboro* decision because that status can be revoked if Congress decides that the school's policies are not " 'in harmony with the public interest' " or that the school acts "in a manner 'affirmatively at odds with [the] declared position of the whole government.' "[54] Furthermore, they should note that if such a program is passed, any school that feels it cannot in good

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allow deductions for contributions to § 501(c)(3) organizations.

50. The schools' attack was two-pronged: (1)only Congress, not the IRS, can condition tax-exempt status and (2), in the alternative, even if Congress had conditioned tax-exempt status on the basis of nondiscrimination, that policy could not constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs.

The Court found that (1) Congress has tacitly approved the actions of the IRS and (2) the government's interest in nondiscrimination is compelling and "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Bob Jones,* 103 S. Ct. at 2035.

51. *Id.* at 2028-29.

52. Justice Powell, in a separate opinion, wrote:

> Even more troubling to me is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole government." Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints.

Id. at 2038.

53. *Id.*

54. *Id.* at 2038. *See supra* note 48 and accompanying text. *See also supra* note 49 for complete quotations.

conscience abide by the government's attendant regulations may[55] find itself in an uncompetitive position in today's competitive market.[56] Private education, whose hallmark has been independence of thought and freedom from undue governmental control, should not walk heedlessly into such a trap.

IV. Conclusion

In *Mueller v. Allen,* the Supreme Court approved for the first time a program of unrestricted governmental aid to sectarian schools and, in so doing, violated heretofore established constitutional principles of the law of church and state. In its failure to address the critical question of whether the tax aid would be used exclusively for secular purposes, the majority opinion undermines the Court's credibility and further confuses Establishment Clause jurisprudence. More importantly, legislators who once felt constrained by constitutional considerations might now be persuaded to vote for a federal program of tax deductions. Legislators and lobbyists should carefully consider the ramifications of such a program. The future of American education is at stake.

55. One should not conclude that all government interests will outweigh all free exercise burdens. Nevertheless, no school can be certain that a free exercise claim will succeed. Justice Brennan once wrote: " '. . .At some point the school becomes 'public' for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.' " Lemon v. Kurtzman, 403 U.S. 602, 652 (1971) (Brennan, J., concurring, quoting Dicenso v. Robinson, 316 F. Supp. 112, 121-22 (D.R.I. 1970)).

56. In *Bob Jones,* for example, the school's unpaid tax liability for the years 1971-75 was $489,675.59. *Bob Jones,* 103 S. Ct. at 2023. Presumably, the school will need to raise its tuition to cover the additional expense unless donors make up the difference. Donors whose contributions are no longer tax-deductible may be hesitant to do so.