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The Supreme Court and Private Schools: An Update

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For the first time, the Supreme Court has explicitly recognized that states may properly "conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian." Consequently, many aid schemes benefiting private schools—and heretofore thought unconstitutional—may in the future be upheld as constitutional.

The Court espoused the virtues of private education in their July 1983 decision, Mueller v. Allen. Mueller upheld, in a 5 to 4 vote, a tuition tax-deduction scheme which permitted parents of Minnesota schoolchildren to deduct expenses incurred in providing "tuition, textbooks, and transportation" for their children, whether they attend public or private schools. The statute was challenged by Minnesota taxpayers who alleged that the tax deduction provided unconstitutional state assistance to sectarian institutions.

There are still some limitations, however, for the Court has also recognized that private schools which violate "public policy" cannot receive government largesse. The Court's words of caution were contained in the May 1983 Bob Jones University v. United States decision, which held 8 to 1 that the tax-exemption provision of the Internal Revenue Code does not extend to institutions whose practices are in violation of "fundamental public policy." The university's religious-based practice of prohibiting interracial dating was deemed contrary to the national policy of nondiscrimination. The university was also unsuccessful in its contention that the Internal Revenue Service could not enforce its policy against schools that engage in racial discrimination based upon "sincerely held religious belief."

Taken together, Bob Jones University and Mueller represent a public-policy breakthrough for private education. Mainstream private education groups such as the National Association of Independent Schools and the Council of
American Private Education support, and their member schools generally conform to, state regulations ensuring a quality education in a socially acceptable environment. This stance reflects these groups' concern that private schools be recognized as beneficial and beneficent so that government will provide fiscal assistance to private education. Such aid will in turn make private education an option available to more parents. Consequently, mainstream private educators opposed Bob Jones University because that institution's practices conveyed the image that private schools were havens for parents of white school children fleeing from integration. Mainstream private-school groups also supported the Minnesota tax-deduction program, not only because the statute conveyed a positive image of private education but also because the Court's upholding of the statute removed another obstacle in the way of government assistance to private schools.

**New Aid for Old Schools**

The *Mueller v. Allen* decision paves the way for expansive (or minuscule) state aid programs that benefit private schools. In *Mueller*, the Court circumscribed several 1970s decisions that had severely restricted state efforts to assist private schools. At issue in *Mueller* was the constitutional provision that "Congress shall make no law respecting an establishment of religion," which applies to state governments through the Fourteenth Amendment to the Constitution.

Three values underlie this Establishment Clause: neutrality, religious accommodation, and separation. Neutrality reflects the belief that all religions should be treated in a similar manner; that government should not extend special benefits to impose special impediments on any religion. Religious accommodation recognizes the inevitability of certain contacts between government and religion, as well as the propriety of some of these contacts to encourage religious practice. Separation seeks to ensure "the integrity of both church and state by prohibiting government from favoring religion over irreligion or vice-versa.

To determine whether a statute is constitutional, the Supreme Court has developed a three-part test: "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." If any of these three elements is not satisfied, the statute will be found unconstitutional.

Supreme Court decisions interpreting this tripartite standard have been mystifying. Since 1971, among the programs the Court has found unconstitutional are salary supplements for private-school teachers, service contracts calling for the state to pay nonpublic schools for providing secular education,
cash grants to schools for the costs of state-prepared and teacher-prepared testing, tuition reimbursement and tax credits for low-income parents, grants to schools for maintenance and repair, loans of instructional equipment and materials to both private schools and private school pupils, and grants for field trip transportation. Yet the Court has also upheld a variety of aid schemes, including school bus transportation, textbook loans, real property tax exemptions, (federal) construction grants for church-related colleges, speech and hearing diagnostic services, medical services, neutral-site therapeutic services, programs for the handicapped, neutral-site guidance and counseling, and direct grants to schools for the cost of state-mandated and state-prepared tests.

Apparently the Court has recognized a certain inconsistency among these decisions, noting "that the wall of separation that must be maintained between church and state is a blurred, indistinct, and variable barrier depending on all the circumstances of particular relationship." In a similar vein, the Court further noted that they can only "dimly perceive" the boundary between constitutional and unconstitutional aid. Therefore, although the tripartite test "is well settled," in particular cases it resembles less a set formula than a "helpful signpost."

One element of the tripartite test, however, is clear. If the government program at issue is arguably nonreligious, the program will satisfy the secular purpose element of the tripartite test. In Committee for Public Education v. Nyquist (1973), the Supreme Court noted:

[W]e do not doubt—indeed, we fully recognize—the validity of the State’s interest in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of the children presently attending nonpublic schools should abandon those schools in favor of the public schools.

In Mueller v. Allen, the Court elaborated on the reasons for this. Past government aid to private schools was accepted because the motivations of the respective states were not unconstitutional. "A state’s decision to defray the cost of educational expenses incurred by parents," wrote the Court, "is both secular and understandable."

Significantly more complicated than the question of secular purpose, however, are those involving the secular effect and entanglement prongs of the tripartite test. Mueller sheds little direct light on entanglement. According to Harvard law professor Laurence Tribe, entanglement occurs when government attempts to "insinuate itself coercively into religious life, by policing the expenditure of public monies to assure, as the establishment clause itself requires, that such monies are expended only for secular purposes." In Muel-
ler, the “only plausible source” of entanglement was the state requirement that their officials determine whether particular textbooks qualify for a deduction. Because the Supreme Court upheld similar procedures in its 1968 Board of Education v. Allen decision, the Mueller Court reasoned that the “same result follows in this case.”

The primary determination the Supreme Court made in Mueller was whether the Minnesota tax-deduction provision violated the secular effect provision of the Establishment Clause test by giving parents of private school children disproportionate benefits. The deduction was limited to actual expenses for “tuition, textbooks, and transportation” of all grade-school or high-school children; a deduction could not exceed $500 per dependent in grades K-6, and $700 per dependent in grades 7-12. Those challenging the statute pointed to the fact “that for the school year 1978-1979 . . . only 79 students paid tuition for attendance at Minnesota public schools. . . . By contrast, the number of school children attending nonpublic schools in Minnesota during the 1979-1980 school year, was 90,954. Of these, 86,808 (95.44 percent) attended schools considering themselves to be sectarian.” Against this position the state argued that the “expenses are quite varied and are, in fact, available to every taxpayer in the state of Minnesota whether that taxpayer’s child attends public or private school.” The state of Minnesota went on to cite tennis shoes, bus transportation, driver training tuition, summer school tuition and the like as examples of deductions open to all.

Who Benefits from Private Education?

Court decisions predating Mueller demonstrated the Justices’ willingness to look beyond the mere language of a statute to determine the actual beneficiaries of a state assistance program. The “primary effect [of an enactment] must be one that neither advances nor inhibits religion.” In two 1973 Supreme Court decisions which invalidated state efforts to make the private education option more affordable, the Court ruled that only those laws which had “a remote and incidental effect advantageous to religious institutions” could pass constitutional muster.

In Committee for Public Education v. Nyquist, the Court invalidated a New York law allowing tax deductions for nonpublic-school tuition payments gauged to the tax bracket of each taxpayer. Writing for the majority, Justice Lewis Powell reasoned that “[b]y reimbursing parents for a portion of their tuition bill, the state seeks to relieve their financial burdens sufficiently to assume that they continue to have the option to send their children to religious-oriented schools.” It did not matter whether or not sectarian institutions actually received money from this; what mattered was that they benefited from them. In the Sloan v. Lemon decision, issued the same day as Nyquist, the
Court rendered unconstitutional a Pennsylvania statute that partially reimbursed parents for nonpublic elementary and secondary school tuition. Following the Nyquist rationale, the Court noted that “we look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit.”

Nyquist and Sloan were considered especially significant since the Court indicated that the state could not even indirectly assist predominantly sectarian private education through parental aid programs. In the 1971 Lemon v. Kurtzman decision the Court concluded that the state could not directly assist private schools if such aid granted the state “any direction, supervision or control over the policy determination, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school.” It thus appeared that only such nonideological aid as bus transportation and textbooks could pass constitutional muster.

The rigid analysis utilized in Nyquist and Sloan was criticized for its shortsightedness. Chief Justice Warren Burger’s dissent noted that the New York and Pennsylvania programs “merely attempt to . . . [give] to parents of private school children, in the form of dollars or tax deductions, what the parents of public school children receive in kind. It is no more than simply equity to grant partial relief to parents who support the public schools they do not use.” The Chief Justice argued that the New York and Pennsylvania programs actually fostered government neutrality towards religion by providing all students a right to attend the school of their choice. A similar criticism was levied at the Court by a Note in the Harvard Law Review:

[T]he overall effect of the government’s school financing program . . . with its disincentives as well as incentives to private education . . . was not evaluated. . . . By defining neutrality narrowly . . . the Court perceived no conflict between [two of the values which underlie the Establishment Clause, namely] neutrality and separation. This narrow approach to neutrality made the Court’s decision appear consistent with both policies; the real conflict between separation and neutrality was never squarely faced.

This is a crucial point. When the Court seeks to determine the “actual beneficiaries” of a state enactment, it looks narrowly to the effect of the enactment on private religious schools. Never do they address the issue of how such laws affect public and nonpublic education as a whole. In other words, an enactment whose marginal effect makes predominantly church-affiliated private education more affordable will be found unconstitutional under the Nyquist-Sloan view—regardless of whether the state could have constitutionally created a school finance system similar to the one resulting from the new laws.

The Nyquist-Sloan standard was loosened somewhat in 1977 with Wolman
v. Walter. In Wolman, the Court upheld those portions of an Ohio statute authorizing expenditures of state funds for supplying nonpublic school students with textbooks, standardized testing and scoring services, on-site speech and hearing diagnostic services, and neutral-site therapeutic and remedial services. At the same time, the Court invalidated those parts of the statute which provided nonpublic schools with instructional materials and field trip services. To justify these seemingly inconsistent rulings, the Court concluded such educational aid is acceptable if it is most likely that it “will only have secular value of legitimate interest to the State and doesn’t present any appreciable risk of being used to aid transmission of religious views.” The Wolman ruling, like Nyquist and Sloan, thus involved a judicial determination as to the “actual effects” of a state aid program.

In Mueller v. Allen, the Supreme Court took an analytical leap of faith and refused to consider the actual effect of the Minnesota program. Justice William Rehnquist, writing for the Court, contended: “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.” They justified this refusal to look at the actual beneficiaries of the Minnesota program by noting private- and public-school parents could both take advantage of the tax-deduction program. Those statutes where the Court did look at actual effects involved state aid programs available only to private schools and parents of private school children. The Mueller Court, however, did not adopt Chief Justice Burger’s view that the Court had been too short-sighted in looking only at the marginal effects of state-aid packages directed at private education. Instead, the Court concluded that, since parents of both public and private school children could participate in the program, the marginal effect of the Minnesota program was presumptively secular. The possible significance of both public and private school children participating in a state-aid program was noted by the Court in its Nyquist opinion: “Allen [textbooks] and Everson [public transportation] differ from the present litigation. . . . In [those] cases the class of beneficiaries

1 The Court also noted that the educational tax deduction was only one among many tax deductions and other tax benefits granted by Minnesota. Minnesota law also allowed deductions for medical expenses and contributions to religious institutions. Stressing that the broad class of beneficiaries able to participate in the Minnesota program created a presumption of permissible “benevolent neutrality” towards religious institutions, the Court noted “that traditionally legislatures have especially broad latitude in creating classifications and distinctions in tax statutes,” in part because the “familiarity with local conditions” enjoyed by legislators especially enables them to “achieve an equitable distribution of the tax burden.” Criticizing this conclusion, Justice Marshall noted in dissent that “[i]t was precisely the substantive impact of the financial support, and not its particular form, that rendered the programs in Nyquist and Sloan v. Lemon unconstitutional.”
included all school children, those in public as well as those in private schools." Yet, as Justice Thurgood Marshall’s dissenting opinion pointed out, that “the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition.” As the largest allowable deduction was for tuition, this break was only for parents of private school children.

**A New Look at Private Schools**

The apparent doctrinal shift set out in *Mueller* is best attributed to the Court’s adoption of two new views of the state’s relationship to private education. First, the Court rejected its earlier adopted position that “political divisions on religious lines is one of the principal evils that the first amendment sought to forestall.” Today, however, the danger of such evils is remote, “and when viewed against the positive contributions of sectarian schools” seems an “entirely tolerable” risk.

Second, the Court in *Mueller* stressed the positive role private schools play in our educational system:

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. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents choose for them.

The Court boldly held that whatever inequality there was in the utilization of such deductions was no more than a “rough return for the benefits... provided to the state and all taxpayers by parents sending their children to parochial school.”

This attitude is quite a shift from the 1975 Supreme Court decision *Meek v. Pittenger*, which found unconstitutional a Pennsylvania statute providing “auxiliary services” (maps, charts, laboratory equipment) to nonpublic school children: “Even though earmarked for secular purposes, ‘When it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,’ state aid has the impermissible primary effect of advancing religion.” This conclusion was predicated on the Court’s view that the real purpose of much sectarian education was “the inculcation of religious values and belief.” Indeed, a remarkable passage contained in Justice William Douglas’s concurring opinion in *Lemon v. Kurtzman* reflects this same view:
In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.

Those challenging the Minnesota scheme advanced this argument: "A strong public education system is essential to the continued success of our democratic society... Continuing efforts to divert revenues from public elementary and secondary schools is cause for alarm... Diverting revenue from public education to support nonpublic, primarily religious school is not only detrimental to our public education system, it violates the concept of separation of church and state." Although a bare five-member majority of the Mueller Court found this argument unpersuasive, four of the Justices still abide by the Nyquist-Sloan formula, noting in their dissent that direct or indirect "aid to the educational function of [parochial schools]... necessarily results in aid to the sectarian enterprise as a whole." ²

In many ways the Mueller decision posited a new theory of church-state relations. Instead of viewing their relationship as necessarily divisive, the Court contended that "[a]t this point in the 20th century we are quite far removed from the dangers that prompted the framers to include the Establishment Clause in the Bill of Rights." In fact, the Court went so far as to recognize that "the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial

² Mueller, by rejecting the view that any aid scheme to private schools is tainted by the pervasively sectarian nature of such schools, may prove important in two significant issues not addressed by the Court. First, state efforts to provide private schools with services or materials have frequently been found unconstitutional by the Supreme Court under the secular effect standard. These rulings concluded that religious indoctrination was so central to these schools that the state could not aid the secular educational component of church-related schools without also aiding these schools' predominant religious mission. Second, if the state sought to ensure that services or materials provided to private schools did not improperly advance religion, the aid program would generally be found unconstitutional under the excessive entanglement standard. These holdings concluded that the state could only ensure that its program had a secular effect through impermissible "comprehensive, discriminating and continued surveillance." The Mueller Court's recognition of the positive secular role that private schools play in our educational system thus rebuts much of the "pervasively sectarian" doctrine of taint that underlaid the invalidation of state efforts to provide materials or services to private schools.
This represents a significant retreat from previous Establishment Clause decisions, in that the Court upheld the Minnesota provision despite the recognition that it was hard to distinguish between the economic effects of this statute and others that had in the past been rendered unconstitutional.

One explanation for this apparently drastic shift in Establishment Clause jurisprudence is the change in the Court's composition since the Nyquist-Sloan "no aid" era. Justices William O. Douglas and Potter Stewart—both part of the majority in the "no aid" era—have been replaced by John Paul Stevens and Sandra Day O'Connor. Justice Stevens has sided with the old view and Justice O'Connor with the new. In addition, Justice Lewis Powell, author of the Nyquist opinion, has modified his position and now supports the new view. Potentially more significant than even these shifts is the great possibility that a reelected President Reagan will appoint more Justices sympathetic to the new view. Justices Thurgood Marshall and William Brennan—both staunch "no aid" advocates—are considered by many Court analysts as being near retirement.

The immediate significance of *Mueller v. Allen* should not be overstated. Though it represents a new approach to Establishment Clause analysis, the Court was careful not to overrule any of its earlier decisions. Therefore most programs that provide direct government assistance to private schools or indirect assistance solely to parents of private school children might still be unconstitutional. What *Mueller* does do is increase the likelihood that government can enact statutory provisions to provide a disproportionate benefit to parents of private school children—so long as parents of public school children can receive the same benefit through that provision. Outside the enactment of tax-deduction programs like the Minnesota plan, just what impact *Mueller* will have on state aid programs to private schools is hard to gauge. On the one hand, aid schemes such as President Reagan's tuition tax-credit proposal are probably unconstitutional since they benefit only parents of private school children. On the other hand, broad-based aid schemes like vouchers that attempt to reshape the whole of American education might very well be constitutional, since their benefits extend to all school children.

*Mueller*, however, does indicate that the Justices might be more receptive to government aid programs which benefit private schools. This is supported by the Court's recent decision in *Lynch v. Donnelly*, a case which upheld the Rhode Island city of Pawtucket's inclusion of a Nativity Scene in its annual Christmas display. As in *Mueller*, the Donnelly decision refused to utilize strict scrutiny standards in assessing the "religious effect" of the crèche. Instead, the Court noted that the "[Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." This apparent trend of loosening Establishment Clause standards will soon be put to another test in the private school context. The Supreme Court has recently
agreed to hear the Grand Rapids v. Ball law suit. This case raises the significant issue of "[w]hether it constitutes a per se violation of the establishment clause to provide secular, supplementary, nonsubstitutionary instructional services to part-time public school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control."

Despite the possibility that the Court's decision in the Grand Rapids case might be favorable to private schools, Mueller might still serve as the impetus for federal and state aid to private education. The National Catholic Education Association, for example, has proposed that the Reagan tuition tax-credit bill be modified to permit parents of public-school children to benefit from the legislation. Additionally, legislators in Wisconsin and New Jersey have recently introduced tax-deduction legislation similar to the Minnesota plan. Yet in those states with high private school enrollments, little effort has been made to mimic Minnesota. A recent study undertaken by the Washington Post blamed the economy for this legislative inertia:

State taxes are going up while services are being trimmed, particularly in many of the northeastern and midwestern industrial states—normally the most fertile grounds for tuition tax benefits. The recession is particularly pressing urban areas . . . where blue-collar ethnic groups with a Roman Catholic heritage are an important part of the political fabric and parochial school enrollments are high.

Another reason there hasn't been a strong legislative push in the states is that most private-school lobbyists had been concentrating on the recently tabled Reagan tuition tax-credit proposal. Once these groups begin to push for state tax-deduction legislation, they can expect a fierce fight from both mainstream public school groups (National Education Association, American Federation of Teachers, and National School Board Association) and constitutional lobbyists (American Jewish Committee, American Civil Liberties Union, the Baptist Joint Committee on Public Affairs, and Americans United for Separation of Church and State). It might ultimately prove to be the case in Mueller that while private school backers won the constitutional battle they lost the war.

Private Discrimination and the Commonweal

The Bob Jones University decision reaffirms the Supreme Court's view that racially discriminatory private schools are a detriment to American education. In 1973, the Court invalidated a Mississippi statute where textbooks owned by the state were lent to both public- and private-school students "without reference to whether any participating private schools has racially discriminatory policies." In 1976, the Court held that section 1981 of the
Civil Rights Act (the right to contract) meant nonsectarian private schools could not deny admission to minority students.

*Bob Jones University* clearly establishes that the government may not provide any benefit—aside from police or fire protection—to racially discriminatory schools. The decision, written by Chief Justice Warren Burger, is replete with language arguing that racially discriminatory private schools cannot serve a public function: "[The] legitimate education function [of such private schools] cannot be isolated from discriminatory practices. . . . [D]iscriminatory treatment exerts a pervasive influence on the entire educational process." The Government has a fundamental, overriding interest in eradicating racial discrimination in education. "Therefore, educational institutions guilty of racial discrimination cannot be considered 'beneficial and stabilizing influences in community life.'"

So determined was the Court to establish the principle that racially discriminatory private schools are not entitled to tax breaks that it gave short shrift to the case's religious liberty issue. In *Bob Jones University*, the majority concluded that the governmental interest at stake "substantially outweighs whatever burden denial of tax benefit places on [the university's] exercise of [its] religious beliefs," that interest being "denying public support to racial discrimination in education." Yet, in determining that the Internal Revenue Code requires tax-exempt institutions to conform with fundamental public policy, the Court declined the opportunity to define a tax-exemption as government aid. What the Court did was elevate the governmental interest so it could summarily dispose of the case's religious liberty issue.

The *Bob Jones University* decision extends beyond private schools with explicit policies of racial discrimination. In unusually sweeping language, the Court defined the limit of public benefits: "Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. . . . 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." In other words, *Bob Jones University* grants the IRS near-plenary authority to deny tax-exempt status to those private schools whose practices the IRS deems "at odds with the common community conscience." Responding to this, Justice Lewis Powell argued in his concurring opinion that the majority "ignores the important role played by tax-exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."

The principles of *Bob Jones University* also extend beyond the mere question of tax-exempt status. The decision can be interpreted to mean that anyone who receives government aid must conform to national public policy
The potential danger here was pointed out in papers filed before the Court in *Bob Jones University*:

And what about the . . . organizations themselves? Would they become subject to myriad regulations and legal obligations . . . ? If so, retirement homes operated by particular religious charities might be forced to admit persons of any creed; private schools or organizations for girls or boys might be forbidden to discriminate on the basis of age; community centers designed to serve particular ethnic groups might have to open their doors to all comers; and any exempt organization might be required to modify its physical facilities to provide access to the handicapped.

Regarding tax-exempt private schools, the question remains what to do with a school that is racially imbalanced due to factors unrelated to racial practices or beliefs. For instance, how should a private school whose classes are taught in German, Chinese, Hebrew, or Swahili be treated? Additional factors, such as location, idiosyncratic curricula and procedures, and admissions criteria based on religion, national origin, or measures of achievement may also lead to racially imbalanced schools.

Nevertheless, despite the potential for extreme interpretation, mainstream private-education groups supported the approach taken in the *Bob Jones University* decision. These private-school groups were concerned with the bad publicity the tax-exemption issue was having on government efforts to aid private education. The 1978 Moynihan-Packwood tuition tax-credit proposal was partially stymied, for example, because of the Carter IRS's conclusion that existing racial nondiscrimination standards for tax-exempt private schools—the standard proposed by tuition tax-credit backers to ensure that participating schools did not discriminate—were inadequate. Similarly, the 1982 Reagan tuition tax-credit proposal was delayed in the Senate Finance Committee until the Supreme Court ruled on *Bob Jones University*. That way, if the Court decided that the nondiscrimination requirement was legally mandated, existing IRS procedures could be used to police schools that participate in the proposed tuition tax-credit program. Consequently, the National Asso-

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3 On November 16, 1983, Kansas Senator Robert Dole presented an amendment to the Senate which specified a nondiscrimination requirement for President Reagan's proposed tuition tax-credit legislation. Although inordinately complex (the Dole amendment takes up close to three pages in the Congressional Record), this proposal is less comprehensive than existing procedures governing the tax-exempt status of racially discriminatory private schools. Under the Dole proposal, discrimination involves a specific act against a specific individual. IRS procedures, on the other hand, also demand that a tax-exempt institution formally adopt and a policy of racial nondiscrimination and advertise such policy in a local newspaper of general circulation. IRS procedures also do not foreclose the possibility of civil rights groups challenging the tax-exempt status of allegedly discriminatory institutions. Contrary to this, the Dole proposal mandates that a school
ciation of Independent Schools, hoping to establish better relationships between government and private education, made the following points before the Court in *Bob Jones University*:

Private schools do believe that they are fully entitled to determine their own philosophy, to design the curriculum and choose the teaching materials and methods they consider the most effective, and to admit students who they believe, and whose parents believe, will benefit from the education offered. But they do not believe that race as a criterion for admission is one that is in accord with the public interest or the public policy.

The position taken by a minority of private schools . . . that there is a right to discriminate on grounds of race, has been a thorn in the side of the private school world as a whole for some time and we are hopeful that the Court will settle the issue for once and for all.

In *Bob Jones University* the Court granted these private school interests their wish.

*Who Qualifies for Help?*

The Supreme Court's decisions in *Bob Jones University* and *Mueller* did not address the state regulation of private schools. This issue is of great and immediate concern, as Christian fundamentalists are currently pressing to have state laws and regulations governing their schools declared unconstitutional on religious liberty grounds.

The fundamentalists believe that the state is for the most part prohibited from interfering with their schools. For them, the state's only legitimate interest lies in ensuring that every school provides its students with an adequate education (reading, writing, computation) and satisfies reasonable fire, health, and safety standards. The fundamentalists refuse to abide by other state regulations. Generally speaking, however, the states are unwilling to give up their authority over the operation of nonpublic schools, believing that existing regulations make educational sense. The states argue further that they are not noticeably interfering with religious practices.

The Supreme Court has not yet resolved this issue. While its decisions suggest the possibility of avoiding participation in the tuition tax-credit program only if it is found racially discriminatory in a court action brought by the U.S. Attorney General.

Also on November 16, the Senate voted (59-38) to table the tuition tax-credit proposal. Not overriding in this decision, however, was the issue of tax credits providing indirect support to racial discriminatory private schools. Opponents of the tax-credit proposal also made allegations concerning: (1) the costliness of tax credits; (2) tax credits' adverse effect on public education; (3) the disproportionate benefit that tax credits provide to families who do not need economic assistance; and (4) that tax credits violate the principle of separation of Church and State, since most private schools are affiliated with some church.
gest that parents have a right to direct the upbringing of their children, it also recognizes that the state may impose reasonable regulations governing the operation of private schools. The line between reasonable and unreasonable regulation and the significance of religious liberty concerns in making that determination are questions still in need of Supreme Court resolution. The decisions of those courts which have faced this issue are incredibly inconsistent. It therefore appears likely that the next significant Supreme Court decision concerning the relationship between government and private education will be on this issue.

Bob Jones University and Mueller did address the issue of how government may aid private schools. Moreover, these decisions recognized the vital role private schools play in the education of American youth. Mueller, more than any other Court decision, legitimates the private education alternative through its recognition of private education not only as a worthwhile provider of education but also as a boost to public education (though competition and the reduction of taxes needed to support the public school system). In short, Mueller says that private schools are beneficial and the state has good reason to support them. Bob Jones University complements Mueller by establishing parameters within which the government may aid private schools; it forbids government from benefiting individual private schools guilty of racial discrimination. The decision also permits the IRS and other executive agencies to develop regulatory schemes that deny government benefits to private schools whose policies are inconsistent with the principle of racial nondiscrimination and other fundamental public policies. The general proposition advanced in Mueller—that private schools are generally beneficent—is not contested in Bob Jones University. Put simply: the Court approves of facially neutral government efforts to aid private schools whose practices are in conformity with community standards.

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Commonplace Book

The concept of a "wall" of separation between church and state is a useful metaphor but is not an accurate description of the practical aspects of the relationship that in fact exists. The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" . . . that was never intended by the Establishment Clause.

United States Supreme Court
Lynch, Mayor of Pawtucket, v. Donnelly (Syllabus)
March 5, 1984