

# Louisiana Law Review

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Volume 44 | Number 3

January 1984

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John H. Runnels

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### Repository Citation

John H. Runnels, *The Constitutionality of Louisiana Aid to Private Education*, 44 La. L. Rev. (1984)

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# THE CONSTITUTIONALITY OF LOUISIANA AID TO PRIVATE EDUCATION

## *Introduction*

Many states have enacted statutes designed to partially relieve the heavy financial burden carried by parents who choose to educate their children in private schools. Because many of these schools are religiously affiliated, these statutes have frequently been attacked as violating the Establishment Clause of the first amendment.<sup>1</sup> Some of these statutes have survived this attack, but many have not. This note will briefly review the standards applied by the United States Supreme Court in deciding the constitutionality of state aid to pre-college private education, and will then consider in light of these standards the constitutionality of several current Louisiana statutes which directly or indirectly aid pre-college private education.<sup>2</sup>

## *Standards Applied by the United States Supreme Court*

The United States Supreme Court held long ago that Congress could provide grants to a religious organization to perform a wholly secular function without violating the Establishment Clause,<sup>3</sup> but such government assistance has been subject to rigorous scrutiny in recent decisions. The first of the modern cases in this area was *Everson v. Board of Education*,<sup>4</sup> a decision which narrowly (five to four) upheld a New Jersey statute authorizing local school districts to provide transportation for school children, including transportation to and from nonprofit, nonpublic schools. Justice Black's majority opinion concluded:

No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . .

. . . New Jersey cannot consistently with the "establishment of religion" clause . . . contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.<sup>5</sup>

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

2. The author is an officer and trustee of The Runnels Schools, Inc., a nonprofit, nonsectarian, nondiscriminatory educational institution located in Baton Rouge, Louisiana.

3. *Bradfield v. Roberts*, 175 U.S. 291 (1899).

4. 330 U.S. 1 (1947).

5. *Id.* at 16.

Chief Justice Burger's majority opinion in *Lemon v. Kurtzman*<sup>6</sup> first stated the three-part test the Court has since followed in examining laws claimed to violate the Establishment Clause: "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.'"<sup>7</sup> As a practical matter, a valid secular legislative purpose is virtually always found, so discussions focus on "effect" and "entanglement." The Court has upheld state programs aiding private education which loaned textbooks,<sup>8</sup> provided transportation,<sup>9</sup> reimbursed expenses for testing and reporting required by state law,<sup>10</sup> provided certain diagnostic and therapeutic services,<sup>11</sup> and granted certain forms of income tax relief.<sup>12</sup> It has invalidated programs paying all or part of teachers' salaries,<sup>13</sup> reimbursing expenses for routine tests written by teachers,<sup>14</sup> providing grants for the maintenance of school facilities,<sup>15</sup> giving partial tuition grants to low-income families,<sup>16</sup> loaning instructional materials other than textbooks,<sup>17</sup> providing certain counseling and remedial services,<sup>18</sup> providing transportation for field trips,<sup>19</sup> and granting other forms of income tax relief.<sup>20</sup> These decisions will be discussed in greater detail in connection with the relevant Louisiana statutes.

As a general rule, public assistance to private elementary and secondary schools has been subject to stricter scrutiny than assistance to private colleges and universities.<sup>21</sup> This discussion will address only direct and indirect assistance to private education at the pre-college level. Note should

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6. 403 U.S. 602 (1971).

7. *Id.* at 612-13 (citation omitted) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

8. *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

9. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

10. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *cf. Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

11. *Wolman v. Walter*, 433 U.S. 229 (1977); *cf. Meek v. Pittenger*, 421 U.S. 349 (1975).

12. *Mueller v. Allen*, 103 S. Ct. 3062 (1983); *cf. Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

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

14. *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *cf. Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

15. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

16. *Id.*; *see also Sloan v. Lemon*, 413 U.S. 825 (1973).

17. *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

18. *Meek v. Pittenger*, 421 U.S. 349 (1975); *cf. Wolman v. Walter*, 433 U.S. 229 (1977).

19. *Wolman v. Walter*, 433 U.S. 229 (1977).

20. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *cf. Mueller v. Allen*, 103 S. Ct. 3062 (1983).

21. *See, e.g., Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

also be taken at this point of *Norwood v. Harrison*,<sup>22</sup> which held a Mississippi program loaning textbooks to students in both public and private schools violative of the fourteenth amendment<sup>23</sup> because the books were lent without regard to whether the schools involved engaged in racially discriminatory practices. The suit was remanded to allow participation only by those schools found not to be racially discriminatory. In the remainder of this article, it is assumed that the Louisiana statutes discussed will be interpreted to allow direct or indirect benefits only to those schools which do not discriminate racially, even where the statutes themselves do not directly address the question.<sup>24</sup>

### *Louisiana Statutes Aiding Private Education*

#### *Transportation*

Louisiana Revised Statutes 17:157-:158 provide for free transportation to all school children *via* buses, common carriers, and ferries. Subsection 158(F) expressly states that such transportation is intended to benefit students in public schools and in nonpublic schools which do not discriminate racially. This is the type of legislation upheld in *Everson*. There is a potential problem, however, in subsection 158(C), which says that if providing transportation directly is not economically feasible, the Department of Education shall reimburse the parent or tutor of any student living more than one mile from the school attended \$125 per student per year, not to exceed \$375 per family per year. Reimbursing parents for the actual costs incurred in transportation is entirely permissible; in fact, this was approved in *Everson* itself. The problem lies in the fact that the amount of reimbursement here does not depend upon the expenses actually incurred; to the extent that this \$125 per child exceeds the actual transportation expenses for a child attending a sectarian school, there would be a positive incentive to send one's children to such a school, violating the Establishment Clause.<sup>25</sup> For example, assume that a given family has three children in the same school, that a parent makes two one-mile trips per day from home to school in an automobile, that there are 180 days in the school year, and that costs are twenty cents per mile. This family would incur transportation expenses of \$144 per year; under the statute, however, the family could be "reimbursed" \$375 per year.

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22. 413 U.S. 455 (1973).

23. U.S. CONST. amend. XIV.

24. Thus, the history of Louisiana's attempts to provide direct and indirect assistance to racially discriminatory private schools established to escape the effects of public school desegregation is not discussed here. See, e.g., *Graham v. Evangeline Parish School Bd.*, 484 F.2d 649 (5th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975); *Poindexter v. Louisiana Fin. Assistance Comm'n*, 296 F. Supp 686 (E.D. La.), *aff'd*, 393 U.S. 17 (1968).

25. See *infra* text accompanying note 49.

This problem could be remedied by amending the statute to allow reimbursement for actual transportation expenses or \$125 per child, whichever is less. Where it is not possible to prove actual expenses, some reasonable estimate should be acceptable, such as the 20.5 cents per mile allowed by the Internal Revenue Service as a deductible business expense.<sup>26</sup>

### *Textbooks and Instructional Materials*

In 1974, Louisiana's program of providing free school books and other materials of instruction to all children in elementary and secondary schools was made part of the new constitution.<sup>27</sup> Louisiana Revised Statutes 17:351-:352 direct the State Board of Elementary and Secondary Education to adopt, approve, and supply textbooks and other materials of instruction to the school children of the state.<sup>28</sup>

The ancestor of section 351, Huey Long's "Free Text Book Act,"<sup>29</sup> was upheld by the Louisiana Supreme Court in *Borden v. Louisiana State Board of Education*<sup>30</sup> and a companion case, *Cochran v. Louisiana State Board of Education*.<sup>31</sup> *Borden*, a four to three decision written by Justice Overton, sustained the Act under challenges based upon both the federal and state constitutions, including challenges based on article IV, section 8 and article XII, section 13 of the Louisiana Constitution of 1921. Article IV, section 8 stated that no "money shall ever be taken from the public treasury, directly or indirectly, in aid of any church . . . . No appropriation from the State treasury shall be made for private . . . purposes to any person . . . ." Article XII, section 13 provided that no "appropriation of public funds shall be made to any private or sectarian school."<sup>32</sup> The court found that the children, not the schools, were the beneficiaries of this program. Due process was not violated since the tax money involved was to be spent legally for a public purpose. The United States Supreme Court affirmed *Cochran*,<sup>33</sup> considering only the federal due process issue. The court found a valid public purpose in the Act, and therefore concluded that there was no "taking of private property for a private purpose."<sup>34</sup>

26. Rev. Proc. 83-74, 1983-41 I.R.B. 16.

27. LA. CONST. art. VIII, § 13(A).

28. See also LA. R.S. 17:7(4), :8(A) (1982).

29. 1928 La. Acts, No. 100.

30. 168 La. 1005, 123 So. 655 (1929).

31. 168 La. 1030, 123 So. 664 (1929), *aff'd*, 281 U.S. 370 (1930).

32. These sections have no counterpart in the 1974 constitution. It has been said that the "sections omitted . . . may not be necessary because of the application of the first amendment to the states and because of the increased Supreme Court activity in state education matters." Sachse, *Article VIII: Does It Change the Status Quo?*, 21 Loy. L. Rev. 123, 124 (1975) (footnotes omitted).

33. 281 U.S. 370, 375 (1930).

34. *Id.* at 375. The Court had not yet held the Establishment Clause applicable to the states.

Justice White's majority opinion in *Board of Education v. Allen*<sup>35</sup> upheld a New York textbook loan program to students in public or private schools. If the textbooks loaned to students in private schools were not those used in the public schools, they had to be approved by the local boards of education. The Supreme Court found that the New York law had a secular legislative purpose, and had a primary effect neither advancing nor inhibiting religion. Absent evidence to the contrary, the Court would not assume that the religious and secular aspects of a religious school's instruction were so intertwined that the textbooks would be used to further the teaching of religion. *Allen* was followed in *Meek v. Pittenger*<sup>36</sup> and *Wolman v. Walter*,<sup>37</sup> which also upheld textbook loan programs. Both of these decisions held the loan of other instructional materials, such as periodicals and maps, unconstitutional, whether the loans were made to the students and their parents or directly to the schools. In both cases, the court found that such loans were in fact made directly to the schools, many of which provided an "integrated secular and religious education,"<sup>38</sup> the loans therefore had a primary effect of advancing religion. While this distinction between textbooks and other instructional materials does not seem entirely logical, it does represent the current state of constitutional doctrine.

Thus Louisiana's textbook loan program rests on firm ground, but loaning other instructional materials to sectarian schools or their students would likely be held unconstitutional. In 1982-1983, the per pupil allotments under these statutes were \$14.05 for textbooks, \$3.90 for library books, and \$2.10 for school supplies<sup>39</sup>—the last two items would presumably be considered "other instructional materials." These amounts are the same for students in both public and private schools.

### *School Lunches*

There are no Supreme Court decisions on the constitutionality of government assistance to school lunch programs at private schools. However, it seems that subsidizing school lunches is even less likely to advance religion or to require excessive government entanglement than other forms of aid the Court has approved. As Chief Justice Burger commented in *Lemon v. Kurtzman*: "Our decisions . . . have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, *school lunches*, public health services, and secular textbooks supplied in com-

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35. 392 U.S. 236 (1968).

36. 421 U.S. 349 (1975).

37. 433 U.S. 229 (1977).

38. *Meek v. Pittenger*, 421 U.S. 349, 366 (1975).

39. 2 State of Louisiana Executive Budget Program 19-247 (1983-1984). "School supplies" includes items such as pencils.

mon to all students were not thought to offend the Establishment Clause."<sup>40</sup> Louisiana Revised Statutes 17:191-:199 implement a state school lunch program which is partially subsidized by the state and the federal governments. The governor's proposed budget for this year notes that last year the "[s]tate funds provided for the Child Nutrition Programs [were] (.09) nine cents per lunch, served in public and non-public schools."<sup>41</sup>

#### *Reimbursement of Required Costs*

Louisiana Revised Statutes 17:361-:365 allow the state to reimburse nonpublic schools for actual costs incurred in providing services, maintaining records, and filing reports required by state law or local school boards. Such costs include those for records or reports of attendance, school evaluation, student health, transportation, textbooks, and student progress. Separate accounting for this reimbursement is required, and this accounting is subject to audit. This program is virtually indistinguishable from the New York statute upheld in the five to four decision in *Committee for Public Education & Religious Liberty v. Regan*.<sup>42</sup> In *Regan*, the reports were characterized as "ministerial," and the Court found that they could not be used for religious purposes. In fact, the district court had found that between eighty-five and ninety-five percent of the reimbursements involved would be for attendance reporting. Since separate books were required for the reimbursement, auditing would not constitute excessive entanglement, especially since the services involved were routine and the amounts claimed could be easily compared with those from the records of hundreds of public schools.

#### *Louisiana Secular Educational Services Law*

The Louisiana Secular Educational Services Law<sup>43</sup> was held unconstitutional by the Louisiana Supreme Court in *Seegers v. Parker*;<sup>44</sup> yet, it has never been repealed. This Act attempted to allow the state to "contract" with teachers in private schools for the teaching of secular subjects. Justice Barham's four to three opinion held the Act to be contrary to the state constitution of 1921, particularly article XII, section 13.<sup>45</sup> Were *Seegers* to arise today, after the adoption of the Louisiana Constitution of 1974, the result would not differ; the statute would be invalid under the United States Supreme Court's interpretation of the federal constitution. Thus,

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40. 403 U.S. 602, 616-17 (1971) (emphasis added).

41. 2 STATE OF LOUISIANA EXECUTIVE BUDGET PROGRAM 19-226 (1983-1984).

42. 444 U.S. 646 (1980).

43. LA. R.S. 17:1321-:1325 (1982).

44. 256 La. 1039, 241 So. 2d 213 (1970), *cert. denied*, 403 U.S. 955 (1971).

45. *Supra* text accompanying note 32.

the question of "reinstatement" of these statutes under the 1974 constitution need not be considered. These statutes are virtually indistinguishable from a Pennsylvania statute held unconstitutional by the United States Supreme Court in *Lemon v. Kurtzman*.<sup>46</sup> In *Lemon*, Chief Justice Burger's majority opinion stated that the degree of state involvement which would be necessary to assure that even well-meaning teachers did not incorporate any religious precepts into their teaching and to do the accounting necessary to separate secular from sectarian expenses would be too great under both the Pennsylvania statute and a somewhat similar Rhode Island statute, and would constitute excessive entanglement of government with religion.

*Elementary and Secondary Education Tuition Credit and Equal Opportunity Education Assistance Act*

The Equal Opportunity Education Assistance Act<sup>47</sup> provided partial tuition grants to low-income parents with children in nonprofit, nonpublic schools. Companion legislation, the Elementary and Secondary Education Tuition Credit,<sup>48</sup> allowed a tuition tax credit of up to \$50 on state income tax for low and middle-income taxpayers with dependants in nonprofit, nonpublic schools. These two statutory programs were very similar to a New York tuition grant and a tuition tax benefit struck down in *Committee for Public Education & Religious Liberty v. Nyquist*.<sup>49</sup> Justice Powell's majority opinion in *Nyquist* said that the incentive given parents by the tuition grant program to send their children to sectarian schools, regardless of the label attached to the incentive, violated the Establishment Clause. *Everson* and *Allen* were distinguished in that the statutes therein took a neutral posture toward religion; here there were no restrictions on how the money was to be spent, and therefore no guarantee that religious and secular education would be kept separate. Also, *Everson* and *Allen* dealt with benefits available to all school children, not just to those in private schools. The tax benefit involved in *Nyquist* was something of a hybrid between a tax credit and a tax deduction. The Court said that the constitutionality of such a plan did not depend upon the label given to the benefit. The Court found no significant difference between this program and the tuition grant program: both had the primary effect of advancing religion.

Both the Equal Opportunity Education Assistance Act and the Elementary and Secondary Education Tuition Credit Act were held unconstitutional by the federal District Court for the Middle District of Louisiana

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46. 403 U.S. 602 (1971). Also note that the United States Supreme Court denied certiorari in *Seegers v. Parker* the same day the opinion in *Lemon v. Kurtzman* was announced.

47. LA. R.S. 17:2990.1-.6 (1982).

48. LA. R.S. 47:85-.89 (Supp. 1983).

49. 413 U.S. 756 (1973).

in *Seegers v. Traigle*,<sup>50</sup> a decision following the recent opinion in *Nyquist*. Neither law has since been repealed by the Louisiana legislature, however, and because this decision does not appear in West's National Reporter System, a researcher might reasonably conclude that these statutes are still in effect.

### *Education Tax Credit*

The most difficult constitutional question is presented by the current education tax credit, Louisiana Revised Statutes 47:297(D). This statute allows a credit on state income tax for actual educational expenses incurred, up to \$25 per year per dependent child in kindergarten through twelfth grade, regardless of whether the child attends a public or a private school. Whether this credit is more like the tax benefit invalidated in *Nyquist* or that approved in *Mueller v. Allen*<sup>51</sup> is not immediately obvious, but it is suggested that the rationale of *Mueller* should be extended to hold this statute constitutional.

*Mueller v. Allen*, decided during the past term of the Supreme Court, upheld a Minnesota state income tax deduction similar in some respects to the New York statute held unconstitutional in *Nyquist*. The Minnesota statute allowed deductions from gross income of up to \$500 for dependents in grades kindergarten to six and up to \$700 for dependents in grades seven to twelve for actual educational expenses incurred, regardless of whether the students attended public or private schools. Deductible expenses were found to include those for tuition (including tuition charged for some special services in public schools); secular textbooks; transportation; gym clothing; materials for home economics, shop classes, and art classes; pencils; and notebooks. Justice Rehnquist's five to four majority opinion urged two reasons why this statute should be distinguished from that in *Nyquist*. First, the deduction involved here was part of a broader scheme of tax deductions allowed by state law, rather than a hybrid tax benefit akin to a tax credit, as had been the case in *Nyquist*.<sup>52</sup> But as Justice Marshall pointed out in his dissenting opinion, *Nyquist* itself recognized that this was a distinction of dubious constitutional significance.<sup>53</sup> The second basis for distinction was the sounder one—that "[u]nlike the assistance at issue in *Nyquist*, [the Minnesota statute] permits *all* parents—whether their children attend public school or private—to deduct their children's educational expenses."<sup>54</sup> The resulting attenuated

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50. LA. TAX CT. REP. (CCH) ¶ 200-471 (M.D. La. Dec. 27, 1973); LA. TAX CT. REP. (CCH) ¶ 200-472 (M.D. La. Jan. 7, 1974) (addendum to original opinion).

51. 103 S. Ct. 3062 (1983).

52. *Id.* at 3067.

53. *Id.* at 3075-76 (Blackmun, Brennan, Marshall, Stevens, JJ., dissenting).

54. *Id.* at 3068-69.

benefits to parochial schools were held not to have the primary effect of advancing religion. The only potential source of entanglement the Court saw was that state officials would have to determine which textbooks would not qualify for the deduction because they included some form of religious instruction.<sup>55</sup> Since similar decisions had to be made in textbook loan programs the Court had already approved, however, excessive entanglement was not seen to be a danger here. Justice Marshall's dissenting opinion emphasized that, as a practical matter, the bulk of the tax benefits involved would flow to parents whose children attended parochial schools, thereby violating the "effect" test.<sup>56</sup>

The Louisiana tax benefit does take the form of a tax credit rather than a deduction, but as pointed out in *Nyquist*, this is a distinction of questionable significance. However, the other ground given in *Mueller* for distinguishing *Nyquist*—that the benefits under the Minnesota statute are available to parents with children in public or private schools—applies to the Louisiana tax credit, and there is an additional feature that distinguishes the Louisiana credit from the Minnesota deduction: Because of the different natures of a tax credit and a tax deduction, only \$25 in educational expenses need be shown in order to obtain the full benefit of the Louisiana law, as opposed to the \$500 or \$700 required to be shown under the Minnesota law. Thus the Louisiana tax benefits are truly available to virtually all taxpayers with dependents in elementary or secondary schools, and will not flow primarily to parents with children attending parochial schools. Under the Minnesota statute, the tax deduction provided would, as a practical matter, have primarily benefited those parents with children in private or parochial schools, a practical result that was the basis for one of the main objections voiced by Justice Marshall in his dissent in *Mueller*.<sup>57</sup> Furthermore, the Louisiana statute provides no incentive to parents to send their children to sectarian schools since the parents of public school children receive the same benefits as parents of students in private schools; such an incentive was the principal reason given in *Nyquist* for holding the tuition grant and tax credit at issue there unconstitutional under the Establishment Clause.

### Conclusion

In summary, Louisiana statutes providing benefits to nonpublic schools and their students in the form of transportation, textbooks, school lunches, and reimbursement for state-required costs are apparently constitutional, although one aspect of the statute providing reimbursement for transpor-

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55. *Id.* at 3071.

56. *Id.* at 3075 (Blackmun, Brennan, Marshall, Stevens, JJ., dissenting).

57. *Id.*

tation expenses might have to be amended slightly in order to be constitutional as applied to sectarian schools. Under recent United States Supreme Court decisions, providing instructional materials other than textbooks to sectarian schools or their students is unconstitutional. The constitutionality of Louisiana's education tax credit is debatable. It is submitted, however, that were the United States Supreme Court to decide the issue today, it would hold this credit to be constitutional, possibly by a greater majority than that in the recent decision of *Mueller v. Allen*.

*John H. Runnels*