

# NOTE

## PUBLIC AID TO PAROCHIAL EDUCATION IN MISSOURI

### I. INTRODUCTION

A parent's right to send his children to a parochial school,<sup>1</sup> although recognized as fundamental,<sup>2</sup> does not entail a right to government financial support of such schools.<sup>3</sup> Courts acknowledge that parochial education benefits both students and society;<sup>4</sup> courts nonetheless invalidate any state program expressly designed to aid religious education.<sup>5</sup> State legislatures—and less frequently the United States Congress—continue, however, to enact programs permitting parochial schools, their pupils, and supporters to obtain certain financial benefits available to public schools. Courts must then decide whether a particular program violates any constitutional restrictions on public aid to religion.<sup>6</sup>

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1. For the purposes of this Note, a parochial school is a privately-owned nonprofit elementary or secondary school that provides an education with some express religious content. No distinction will be drawn between schools owned and controlled directly by a particular church and those owned and controlled by a society of parents.

Privately-owned schools practicing racial discrimination are not included in this discussion, although they may otherwise meet the terms of the definition. *See* *Norwood v. Harrison*, 413 U.S. 455 (1973).

2. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

3. *See* *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

4. *See, e.g., Board of Educ. v. Allen*, 392 U.S. 236, 247-48 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Harfst v. Hoegen*, 349 Mo. 808, 816-17, 163 S.W.2d 609, 614 (1942) (en banc).

5. *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963): "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Schempp* invalidated Bible reading in a public school, but the quoted sentence now also applies to public aid to parochial schools. *See* note 6 *infra*.

6. The United States Constitution imposes explicit, though somewhat contradictory requirements: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. These requirements also apply to the states. *See* *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court has developed a three-part constitutional test for state programs that provide aid to parochial schools, their pupils, or supporters: the program must have a secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must not involve excessive entanglement between the affairs of church and state. *See, e.g., Lemon v.*

Unlike most states, Missouri has developed a body of state constitutional law that virtually prohibits any aid to parochial schools in any form. The 1974 Missouri supreme court decision in *Paster v. Tussey*,<sup>7</sup> the capstone of this constitutional doctrine, erected an absolute wall of separation between parochial schools and state aid. As interpreted in *Paster*, the Missouri constitution forbids any aid that directly or indirectly benefits church related schools, regardless of the putative recipient.<sup>8</sup> Subsequent attempts to amend the Missouri constitution to overrule *Paster* and to permit some state aid to parochial schools have failed.<sup>9</sup> It is therefore appropriate to reassess the legal and constitutional foundations of the existing Missouri doctrine.

This Note will undertake such a reassessment. Section I will outline Missouri's constitutional limitations on aid to religious education and discuss the Missouri supreme court's interpretation of these sections. The conclusion is that Missouri courts have neither closely analyzed nor correctly interpreted these provisions. The consequence is a rule uniquely restrictive of state aid to parochial schools. Section II will analyze these restrictions in light of the free exercise clause of the first amendment to the United States Constitution,<sup>10</sup> and the equal protec-

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Kurtzman, 403 U.S. 602, 612-13 (1971). For a discussion of the three-part test, see Note, *Establishment Clause Analysis Of Legislative And Administrative Aid To Religion*, 74 COLUM. L. REV. 1175 (1974); text accompanying note 151 *infra*. An emerging fourth test is that the aid must lack potential to foster political divisiveness along religious lines. See *Meeck v. Pittenger*, 421 U.S. 349, 372 (1975); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794-98 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). See generally Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Duval, *The Constitutionality Of State Aid To Nonpublic Elementary And Secondary Schools*, 1970 U. ILL. L.F. 342; Freund, *Public Aid To Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Valente & Stenmeyer, *Public Aid To Parochial Schools—A Reply To Professor Freund*, 59 GEO. L.J. 59 (1970); Wedlock & Jasper, *Parochial Aid and the First Amendment: Past, Present and Future*, 2 J. L. & EDUC. 377 (1973); Note, *Parochial School Aid: A Public Perspective*, 35 OHIO ST. L.J. 104 (1974).

Any state program aiding parochial schools must also satisfy the requirements of that state's constitution which may be more restrictive than the first amendment. The provisions of the Missouri constitution and their interpretation are the subject of this Note.

7. 512 S.W.2d 97 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975), *discussed in* notes 79-154 *infra* and accompanying text.

8. See notes 79-154 *infra* and accompanying text.

9. In the August, 1976, primary election, Missouri voters defeated an attempt to amend the Missouri constitution to allow the state to provide transportation, auxiliary services, and textbooks to students attending parochial schools. *St. Louis Globe-Democrat*, Aug. 5, 1976, § A, at 13, col. 1.

10. "Congress shall make no law . . . prohibiting the free exercise [of religion]

tion clause of the fourteenth amendment.<sup>11</sup> In both instances, the conclusion is that the strict Missouri rule conflicts with these overriding federal policies. Although federal courts have yet to accept this conclusion, they have not been confronted with a challenge to the strict rule enunciated in *Paster*. A new challenge to the *Paster* rule based on the United States Constitution might therefore succeed.

## II. THE DEVELOPMENT OF THE MISSOURI RULE

### A. *The Constitutional Provisions*

The Missouri constitution contains several provisions relevant to state aid to parochial education. Article 1, section 6, of the constitution, a part of the Missouri Bill of Rights, prohibits the state from compelling any person to "support . . . any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion."<sup>12</sup> Section 7 prohibits taking money from the public treasury, "directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any . . . teacher thereof, as such."<sup>13</sup>

Article IX of the constitution applies to education. Section 1(a) requires the state legislature to establish and maintain free public schools.<sup>14</sup> Section 5 requires that monies for the public schools be "sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free

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. . . ." U.S. CONST. amend. I. See note 6 *supra* and notes 194-95 *infra* and accompanying text.

11. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See note 6 *supra* and notes 192-93 *infra* and accompanying text.

12. MO. CONST. art. I, § 6:

[N]o person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

13. MO. CONST. art. I, § 7:

[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and . . . no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

14. MO. CONST. art. IX, § 1(a):

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state . . . .

public schools, and for no other uses or purposes whatsoever."<sup>15</sup> This section implicitly prohibits expenditures from the "public school fund" to assist parochial schools, their supporters, or pupils.<sup>16</sup> The most sweeping injunction of aid to parochial education is article IX, section 8, which prohibits any body of state or local government, including school districts, from appropriating or paying from "any public fund whatever, *anything* in aid of any religious creed, church or sectarian purpose," or to help support any school "controlled by any religious creed, church, or sectarian denomination whatever."<sup>17</sup>

These constitutional provisions do not per se outlaw all assistance to parochial schools. The language of the Missouri constitution, although more explicit than the first amendment of the United States Constitution, is not necessarily more restrictive. Courts in other states have construed similar constitutional language to allow state aid to church-related schools when permitted by the first amendment.<sup>18</sup> Missouri courts, however, have interpreted the language more narrowly.

### B. *The Court Interpretations*

The Missouri supreme court in 1942 first discussed the issue of state

15. MO. CONST. art. IX, § 5:

The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatever.

16. See Special Dist. for the Educ. & Training of Handicapped Children v. Wheeler, 408 S.W.2d 60, 63 (Mo. 1966); McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953).

17. MO. CONST. art. IX, § 8 (emphasis added). The complete section reads:

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

*Id.*

18. See, e.g., Board of Educ. v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *aff'd on other grounds*, 392 U.S. 236 (1968). See also cases cited note 143 *infra*.

aid to parochial education in *Harfst v. Hoegen*.<sup>19</sup> The school board of a small Missouri town had incorporated a Catholic parish school into the local public school district and maintained it with public funds. After its inclusion in the public system, the parochial school used the textbooks and course of study prescribed by the state Superintendent of Schools. In all other respects, however, the school continued to operate as a sectarian institution.<sup>20</sup>

The supreme court invalidated the town's practice on three grounds. First, the court held that compelling children of every faith to attend a parochial school,<sup>21</sup> perhaps to participate in religious activities, denied them religious freedom.<sup>22</sup> Second, the court found that use of public funds to support a school still controlled by the Catholic church<sup>23</sup> violated article IX, section 8.<sup>24</sup> Finally, the court held that article I, section 7,<sup>25</sup> prohibited employment of members of religious orders to teach any courses in schools supported by public funds.<sup>26</sup>

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19. 349 Mo. 808, 163 S.W.2d 609 (1942) (en banc).

20. *Id.* at 811, 163 S.W.2d at 610. The school retained the name St. Cecelia School, priests and nuns continued to teach classes, the day opened with prayer, Mass was held for all children in an adjacent church each morning before school, religious instruction was included in the regular curriculum, and religious pictures and symbols were hung in the classroom. *Id.* at 811-12, 163 S.W.2d at 610-11.

Apparently, not all Catholic parents wanted the school to be supported with public funds. "Almost all of the persons engaged in this controversy are . . . Catholic." *Id.* at 811, 163 S.W.2d at 610.

21. In addition to the incorporated parochial school servicing all Catholic children, the school district maintained another school which only Protestant children attended. *Id.* at 812, 163 S.W.2d at 611. It is unclear from the court's opinion whether children were assigned to each school solely on the basis of religion. Nor did the court indicate whether non-Catholic children were actually attending the parochial school at the time of the suit.

22. *Id.* at 814, 163 S.W.2d at 612. The guarantee of religious freedom was in Mo. CONST. art. II, § 5 (1875), now art. I, § 5, and in Mo. CONST. art. II, § 6 (1875), now art. I, § 6, see note 12 *supra*.

The court found no significance in "[t]he fact that attendance at Mass is customarily before school hours or that religious instruction may be given during recess periods or that the participation of a non-Catholic child in these services may not be required." 349 Mo. at 814, 163 S.W.2d at 612-13.

23. The court characterized the school board's supervision as "nominal" and rejected the argument that the school board rather than a sectarian denomination controlled the school. 349 Mo. at 815, 163 S.W.2d at 613. For an illustration of the extent of control that the church had over the incorporated school, see note 28 *infra*.

24. 349 Mo. at 814, 163 S.W.2d at 613. See note 17 *supra* and accompanying text. At the time of the decision, this provision was found in Mo. CONST. art. II, § 11 (1875).

25. See note 13 *supra*.

26. *Harfst v. Hoegen*, 349 Mo. 808, 816, 163 S.W.2d 609, 614 (1942) (en banc).

The practice<sup>27</sup> invalidated in *Harfst* was so obvious a violation of

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The court held that the constitutional policy of the state, decreeing "absolute separation of church and state," barred consideration of the teachers' full qualifications under state standards and their "most unselfish and highest motives." *Id.*

Other states have sustained the employment of members of religious orders as teachers in public schools. In *Millard v. Board of Educ.*, 121 Ill. 297, 10 N.E. 669 (1887), the court referred to teachers as "members" of the Catholic church and as "Catholic teachers," but did not specify that they were members of a religious teaching order. No specific constitutional provision was mentioned. See also *Gerhardt v. Heid*, 66 N.D. 444, 267 N.W. 127 (1936) (employment of members of religious order to teach public school does not violate constitutional provision prohibiting use of public school funds to support sectarian school); *Hysong v. School Dist.*, 164 Pa. 629, 30 A. 482 (1894) (in absence of sectarian teaching, employment of members of religious orders is within the discretion of the school board and denial of such employment would deprive a person of public employment because of his religious belief). But cf. *McDonald v. Parker*, 130 Ky. 501, 110 S.W. 810 (1908) (uncompensated services as teachers in public school by teachers from denominational college is not invalid, provided that no tax funds are thereby diverted to aid any parochial school).

27. Incorporating a parochial school into a public school system was not unusual in the late nineteenth and early twentieth centuries. See, e.g., *Millard v. Board of Educ.*, 121 Ill. 297, 10 N.E. 669 (1887); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940); *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956); *McDonald v. Parker*, 130 Ky. 501, 110 S.W. 810 (1908); *Richter v. Cordes*, 100 Mich. 278, 58 N.W. 1110 (1894); *State ex rel. Public School Dist. v. Taylor*, 122 Neb. 454, 240 N.W. 573 (1932); *Gerhardt v. Heid*, 66 N.D. 444, 267 N.W. 127 (1936); *Hysong v. School Dist.*, 164 Pa. 629, 30 A. 482 (1894); *Dorner v. School Dist.*, 137 Wis. 147, 118 N.W. 353 (1908).

These cases did not involve statutory provisions for statewide aid. Consequently, only local practices, rather than programs applicable to an entire state, were adjudicated. This type of "aid" to parochial schools may exist without challenge in some localities even today.

A court may invalidate incorporation of a parochial school on two distinct grounds: (1) that the incorporated school is a public school in which religious exercises are unconstitutional, cf. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading in public school violates first amendment); *Engle v. Vitale*, 370 U.S. 421 (1962) (nondenominational prayer in public school violates first amendment); or (2) that the school is a parochial school which may not receive any public support, see, e.g., *Knowlton v. Baumhover*, *supra* (although court may not interfere with operation of parochial school, it may enjoin appropriation of public funds for support or aid of such school); *State ex rel. Public School Dist. v. Taylor*, *supra* (state superintendent need not recognize school district as public and entitled to share in public school funds if only school in district is parochial); *Dorner v. School Dist.*, *supra* (school district may rent building owned by church for use as public school building, but may not maintain a parochial school with public funds).

The critical factors in determining whether a school is parochial, not public, are distinct sectarian religious instruction, *State ex rel. Johnson v. Boyd*, *supra*; *Knowlton v. Baumhover*, *supra*; *State ex rel. Public School Dist. v. Taylor*, *supra*; *Gerhardt v. Heid*, *supra*; *Dorner v. School Dist.*, *supra*; see *Millard v. Board of Educ.*, *supra*; Note, *Catholic Schools and Public Money*, 50 YALE L.J. 917, 924 & n.49 (1941), and dominant con-

church-state separation that lengthy analysis of the case is unwarranted.<sup>28</sup> *Harfst* is nonetheless important as the first Missouri supreme court statement on the issue of public aid to parochial schools. The court recognized the "great need of spiritual training" throughout the world,<sup>29</sup> acknowledged that many parochial schools are "great educational institutions" with "high standards of excellence," and recognized "that parochial education is an embodiment of one of the highest ideals that men may enjoy."<sup>30</sup> Nevertheless, the validity of the incorporation practice was purely a legal question,<sup>31</sup> and the law was clear:

The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education

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trol by officials of the church, *see State ex rel. Traub v. Brown*, 36 Del. 181, 186, 172 A. 835, 837 (1934); *State ex rel. Johnson v. Boyd*, *supra* at 372-73, 28 N.E.2d at 266-67; *Knowlton v. Baumhover*, *supra* at 696-98, 166 N.W. at 204; *cf. Richter v. Cordes*, *supra*. "The word 'control' has no legal or technical meaning distinct from that given in its popular acceptance." *Gerhardt v. Heid*, *supra* at 457, 267 N.W. at 134, *citing* 13 C.J. 837 (1917). For examples of the degree of control commonly exercised by church officials, *see note 28 infra*.

28. Eleven years after *Harfst*, the court faced a similar problem in *Berghorn v. Reorganized School Dist.*, 364 Mo. 121, 260 S.W.2d 573 (1953). Again the issue was whether public funds could be used to support nominally public schools operated by a church. The court held that the schools were parochial because of the control exercised by the Catholic church.

Several factors convinced the court that the schools were not controlled by the public school board. After the schools were inducted into the public school system, they were "operated by the Roman Catholic Church as . . . parochial schools under and in accord with the Roman Catholic Church laws and policies." If church and school board issued conflicting orders, the teachers were obligated by their religious oaths to ignore the secular authorities in favor of the church authorities. Title to the school buildings remained in the Roman Catholic Church. *Id.* at 133, 260 S.W.2d at 578-79. Other persuasive factors were the religious garb and emblems of teachers, daily religious services for the students in churches located on the same property as the schools, religious instruction of pupils on Saturday mornings by the same teachers who taught regularly in the schools, assignment of non-Catholic children to different schools, church canons requiring Catholic children to be educated in schools in which religion is the most important element, and recess of school for religious as well as legal holidays. *Id.* at 139-40, 260 S.W.2d at 583-84.

The supreme court held that Mo. CONST. art. I, § 5, art. I, § 6, and art. IX, § 8, invalidated the payment of public funds to support the schools. The court did not reach the allegation that public support of the schools violated the due process clause, Mo. CONST. art. I, § 10.

29. 349 Mo. at 817, 163 S.W.2d at 614.

30. *Id.*

31. *Id.*

or otherwise. If the management of this school were approved, we might next have some other church gaining control of a school board and have its pastors and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none.<sup>32</sup>

In *Harfst*, the court decreed *absolute* separation of church and state in the context of virtually complete integration of church and state. The school board rendered direct aid to the church as an institution;<sup>33</sup> the church participated directly in government affairs through its relationship with the school board. A decree of absolute separation was unnecessary to resolve the case, and might properly be considered dictum. Subsequent reliance on this dictum, when the church-government relationship was less direct, led to extension of the *Harfst* result well beyond its legal rationale.<sup>34</sup> Moreover, the *Harfst* court evidently feared political division along religious lines if public funds were expended in support of one particular religion.<sup>35</sup> When aid would not promote such political strife, the policy rationale of *Harfst* would not support extension of its sweeping language.

Eleven years after *Harfst*, in *McVey v. Hawkins*,<sup>36</sup> the Missouri supreme court held that article IX, section 5, of the Missouri constitution<sup>37</sup> prohibits public school districts from using the "public school fund" to transport parochial school children to class.<sup>38</sup> In *McVey*, a local school board had used public school buses to transport

32. *Id.*

33. See notes 20-23, 28 *supra*.

34. See *Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975), *discussed in* notes 79-154 *infra* and accompanying text; *Special District for the Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60, 63-65 (Mo. 1966); *McVey v. Hawkins*, 364 Mo. 44, 50-55, 258 S.W.2d 927, 930-31 (1953). Although the court in *Special District* and *McVey* did not use the phrase "absolute separation of church and state," the doctrine undoubtedly influenced the results. See also 40 Mo. L. REV. 342, 344 & n.20 (1975).

35. 349 Mo. at 817, 163 S.W.2d at 614:

If the management of this school were approved, we might next have some other church gaining control of a school board and have its pastor and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society . . . .

36. 364 Mo. 44, 258 S.W.2d 927 (1953).

37. See note 15 *supra* and accompanying text.

38. 364 Mo. at 56, 258 S.W.2d at 933-34.



children part way to a parochial school located in another school district.<sup>39</sup> The school board claimed express authorization to transport the children under a statute permitting school districts to provide free transportation for pupils of all nonprofit schools in the district.<sup>40</sup> The board also contended that it was not spending public funds for transportation of parochial school children because the district incurred no additional expenses under the busing plan.<sup>41</sup> Finally, relying on *Everson v. Board of Education*,<sup>42</sup> the board argued that transportation of parochial school children was "valid and constitutional as a lawful exercise of the police power of the state."<sup>43</sup>

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39. *Id.* at 47-48, 258 S.W.2d at 927-28.

40. See Law of May 15, 1939, § 9197, 1939 Mo. Laws, at 719; *id.* § 16a, at 720: When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state superintendent of schools, the amount paid for the transportation . . . shall be a part of the minimum guarantee of such school district for the ensuing year . . . and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private schools shall be paid as herein provided for the transportation of pupils to public schools.

41. 364 Mo. at 51-52, 258 S.W.2d at 930-31. The school board based this argument on the statutory provision for additional funds to school districts only for pupils actually delivered to schools within that district. Since the parochial school to which the pupils were delivered was located outside the district involved in the case, that district had not received any funds under § 16a, see note 40 *supra*, for transporting parochial school children. The trial court had accepted this argument.

42. 330 U.S. 1 (1947). In *Everson*, the United States Supreme Court sustained a New Jersey statute that appropriated state funds to reimburse the parents of parochial school children, as well as the parents of public school children, for the costs of transporting their children to and from school. The Court found that this expenditure was for the valid public purpose of having children ride public buses rather than "run the risk of traffic and other hazards incident to walking or 'hitchhiking.'" *Id.* at 6-7. Therefore the legislation did not violate the due process clause of the fourteenth amendment. *Id.* The Court also stated that, although the reimbursement approached the "verge" of unconstitutionality, *id.* at 16, it did not breach the "high and impregnable" wall of separation between the affairs of church and state and thus did not violate the first amendment. *Id.* at 18.

43. 364 Mo. at 55, 258 S.W.2d at 933. Since *Everson*, numerous states have adopted similar programs to provide transportation to children attending parochial schools. In 1973, 27 states provided some form of publicly-financed transportation to pupils in all schools. *Luetkemeyer v. Kaufman*, 364 F. Supp. 376, 381 (W.D. Mo. 1973), *aff'd mem.*, 419 U.S. 888 (1974).

The variety of state constitutional provisions on church-state relations has spawned a considerable amount of litigation over these transportation programs. Some states have held that free transportation of all pupils is valid even under restrictive provisions of state constitutions because it benefits the children rather than the parochial schools.

The court rejected all of the board's arguments by focusing on the purpose of the expenditure. Because the incidental fund from which the district paid the transportation expenses was partially derived from

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*See, e.g., Bowker v. Baker*, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); *Adams v. County Comm'rs*, 180 Md. 550, 26 A.2d 377 (1942); *Board of Educ. v. Wheat*, 174 Md. 314, 199 A. 628 (1938); *Everson v. Board of Educ.*, 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945), *aff'd*, 330 U.S. 1 (1947).

Other states have sustained state-financed transportation of all pupils because it protects the health and safety of all children who attend school. *See, e.g., Bowker v. Baker, supra; Snyder v. Newtown*, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1961); *Nichols v. Henry*, 301 Ky. 434, 191 S.W.2d 930 (1945); *Board of Educ. v. Wheat, supra; Americans United Inc. as Protestants & Other Ams. United for Separation of Church & State v. Independent School Dist.*, 288 Minn. 196, 179 N.W.2d 146 (1970); *Rhoades v. School Dist.*, 424 Pa. 202, 226 A.2d 53, *cert. denied*, 389 U.S. 846, *appeal dismissed*, 389 U.S. 11 (1967).

Another common basis for sustaining equal transportation benefits is that they promote compliance with compulsory school attendance laws. *See, e.g., Bowker v. Baker, supra; Adams v. County Comm'rs, supra; Board of Educ. v. Wheat, supra; Everson v. Board of Educ., supra. Cf. School Dist. v. Houghton*, 387 Pa. 236, 128 A.2d 58, 70 (1956) (Musmanno, J., dissenting):

The children of today are the citizens of tomorrow. Many of the bare-kneed tots who wait for a lift along the dusty margins of a country road will one day be manning the Ship of State. Whether they will be qualified to handle the ship of America's destiny in calm and in stormy waters will depend to a great extent on the training they receive in their formative years. The emphasis, therefore, should be on amplifying rather than restricting the means which will permit the children to obtain as much schooling as possible.

Other states, however, have held that publicly-financed transportation of parochial pupils violates state constitutional provisions. Sometimes constitutional provisions that prohibit any state aid to parochial schools, directly or indirectly, are the impediment. *See, e.g., State ex rel. Traub v. Brown*, 6 W.W. Harr. 181, 172 A. 835 (Del. 1934); *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941); *Visser v. Nooksack Valley School Dist.*, 33 Wash. 2d 699, 708-09, 207 P.2d 198, 203 (1949); *Judd v. Board of Educ.*, 278 N.Y. 200, 211, 15 N.E.2d 576, 582 (1938). Other courts have held that transportation of public school pupils is valid only as an incident to the state's duty to provide public schools. *See Gurney v. Ferguson, supra; Mitchell v. Consolidated School Dist.*, 17 Wash. 2d 61, 68, 135 P.2d 79, 82 (1943); *Tockman, The Constitutionality of Furnishing Publicly Financed Transportation to Private and Parochial School Students in Missouri*, 1963 WASH. U.L.Q. 455, 467-68, 505; *cf. School Dist. v. Houghton*, 387 Pa. 236, 128 A.2d 58 (1956); *State ex rel. Van Straten v. Milquet*, 180 Wis. 109, 192 N.W. 392 (1923). Under this theory transportation of parochial school students is unconstitutional because tax revenues may not be appropriated for private purposes. *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 514 (1937); *Green v. Frazier*, 253 U.S. 233, 238 (1920); *Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 717 (1910). *See also Mo. CONST. art. X, § 3.* A third group of courts, while agreeing that such transportation is beneficial because it promotes the safety and welfare of the children attending school, have outlawed transportation of parochial school pupils because it incidentally aids the parochial schools. *See, e.g., Spears v. Honda*, 51 Hawaii 1, 12, 449 P.2d 130, 137 (1968); *Epeldi v. Engelking*, 94 Idaho 390, 396, 488 P.2d 860, 866

the state public school fund,<sup>44</sup> the constitution required its use solely to establish and maintain free public schools. The court reasoned that "the public school funds used to transport the pupils part way to and from the [parochial school] . . . are not used for the purpose of maintaining free public schools . . ." <sup>45</sup> The board's argument that such services involved no additional cost was irrelevant;<sup>46</sup> the question was the purpose of the money actually being spent. The court noted that

[o]ne could equally contend that, since the board had equally authorized the transportation of parochial school children, the entire cost of the transportation was for their benefit and that the public school children were being transported at no additional expense to the district.<sup>47</sup>

The court also rejected as irrelevant the school board's other two arguments. The state legislature obviously could not authorize a breach of the state constitution;<sup>48</sup> *Everson* considered the extent of state police power under the first amendment to the United States Constitution, not the permissible uses of Missouri's public school fund.<sup>49</sup>

The validity of the court's decision depends on the applicability of article IX, section 5, to the transportation expenditures involved; only the "public school fund" must be spent solely to establish and maintain the free public schools.<sup>50</sup> The Missouri constitution defines the "public school fund" as:

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(1971), *cert. denied*, 406 U.S. 957 (1972); *Judd v. Board of Educ.*, *supra* at 214, 15 N.E.2d at 584; *Mitchell v. Consolidated School District*, *supra*. See generally *Annot.*, 41 A.L.R.3d 344 (1972).

44. Mo. CONST. art. IX, § 5.

45. 364 Mo. at 56, 258 S.W.2d at 933-34.

46. *Id.* at 54, 258 S.W.2d at 932-33.

47. *Id.* at 54, 258 S.W.2d at 933.

48. See *id.* Because the school board relied on the statute as a defense, the court felt obliged to question its constitutionality. *Id.* at 52, 258 S.W.2d at 931. The opinion makes clear, however, that the board's major argument was that transporting the parochial school children did not cost the district any additional money. Had the board intended to rely primarily on the statute, it would not also have argued that it had received no reimbursement under the statute for transporting parochial school children. The trial court had declined to rule on the constitutionality of the statute "on the ground that no matter connected with said section was directly involved . . ." 364 Mo. at 51, 258 S.W.2d at 930.

49. *Id.* at 55, 258 S.W.2d at 933.

50. Mo. CONST. art. IX, § 5. Even this conclusion is not automatically true, because the only funds explicitly limited to the exclusive support of public schools are the income from the "public school fund."

The court frequently referred to the language in the section directing that income of the "public school fund" "be faithfully appropriated for establishing and maintaining free

all certificates of indebtedness due the state school fund, and all monies, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat.

. . .<sup>51</sup>

The *McVey* court assumed that the transportation funds were part of this public school fund. In fact, these funds came from the local district's "incidental fund," only a portion of which was derived from the state public school fund.<sup>52</sup> Article IX, section 5, imposes *constitutional* restrictions only on the *state* public school fund, without mentioning local incidental funds. The court nonetheless assumed that the constitutional limitation applied to all local funds; the court characterized the "essential question" as "whether the use of the public school

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public schools, and for no other uses or purposes whatever." See 364 Mo. at 53, 55, 56, 258 S.W.2d at 932-34. These references to the language of § 5 would indicate that the court based its decision solely on a violation of § 5, although the court's ultimate holding was that the transportation of parochial school students was "unlawful" and not that it was "unconstitutional." *Id.* at 56, 258 S.W.2d at 934.

Even if the funds for equal transportation benefits may not be channeled through public schools, the state might create a public agency that would provide bus transportation for pupils of all schools. See La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. L. 76, 86 (1964) (footnotes omitted):

In short, state provision of bus transportation can properly be limited to public school children if the administration is part of the public school administrative system. But if school transportation becomes a general state or municipal welfare measure administered by regular government agents, the services must be available to children attending all schools. This rationale leaves the problem of exclusion of bus transportation benefits up to a legislative intent.

If the Missouri General Assembly does enact legislation authorizing public expenditures for transporting parochial school pupils, any challenge to the legislation would probably be brought under Mo. CONST. art. IX, § 8. In *Bowker v. Baker*, 73 Cal. App. 2d 653, 167 P.2d 256 (1946), the California court of appeals construed a provision of the California constitution, now CAL. CONST. art. XIII, § 24, that is virtually identical to Mo. CONST. art. IX, § 8, to permit state-financed transportation of parochial school pupils. The court found that the transportation benefited the children rather than the parochial school, protected the health and safety of all children that attend school, and promoted compliance with the state's compulsory attendance law. See also *Board of Educ. v. Bakalis*, 54 Ill. 2d 448, 299 N.E.2d 737 (1973). If the Missouri court were to invalidate such legislation, the decision would reflect a difference in judicial attitudes rather than a necessary interpretation of a constitutional provision.

51. Mo. CONST. art. IX, § 5.

52. 364 Mo. at 58, 258 S.W.2d at 932. The "incidental fund" from which school districts were to pay all bus transportation costs was derived in part from local taxation, collected and paid to the district, and in part from state aid under § 16a, see note 40 *supra*, "apportioned from the appropriation of state moneys raised by taxation augmented by accrued income derived from the State Public School Fund." 364 Mo. at 51, 258 S.W.2d at 930.

monies, to wit, the incidental funds of the district, for defraying the expenses of transporting the parochial school children . . . is a use for the purpose" mandated in section 5.<sup>53</sup> Nowhere did the court justify this equation of local "incidental funds" with the state "public school fund" named in the constitution. Of course, this fund might mean *all* public expenditures for education. Perhaps proper accounting techniques would require a pro rata share of the transportation funds to be deemed expended from the public school fund. *McVey* should have addressed these questions directly. The court's failure to do so means that the decision rests on an unproven premise.

*McVey's* failure to define "public school fund" has also allowed subsequent decisions to expand the strictures of article IX, section 5, to all public funds.<sup>54</sup> *McVey* holds that those monies in the public school fund cannot be used to assist parochial school children. The equation of "public school fund" with all public funds allowed the *Paster* court to significantly expand the *McVey* rule: "In *McVey* . . . this court held that transportation of parochial school pupils was an expenditure of public school funds for other than [constitutional purposes]."<sup>55</sup> This language strongly hints that any transportation of such pupils at public expense is unconstitutional, a result broader than *McVey* requires.

Finally, *McVey* involved a continuing expenditure of public funds, and did not address an expenditure originally made for public school purposes and later used for a purpose arguably forbidden by article IX, section 5. If, for example, a school district bought a bus, used it for ten years, and then gave it to a parochial school, it is uncertain whether *McVey* would ban such a gift. *McVey* does not make clear, therefore, whether the uses of property purchased with section 5 funds must *always* conform to the purposes of the section. If article IX, section 5, controls the disposition of school property as well as the use of state funds, the power of local school districts efficiently to dispose of their used property may be illogically limited.

The church-state issue next arose in Missouri in the context of publicly supported auxiliary services for parochial school students. During the 1963-64 school year, the St. Louis County Special District for the Edu-

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53. 364 Mo. at 53, 258 S.W.2d at 932.

54. See *Paster v. Tussey*, 512 S.W.2d 97, 101 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975); *Special Dist. for the Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60, 63 (Mo. 1966).

55. *Paster v. Tussey*, 512 S.W.2d 97, 101 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975), *discussed in text* accompanying notes 79-154 *infra*.

cation and Training of Handicapped Children sent its speech therapists into county parochial schools to provide speech services directly to parochial students. The State Board of Education refused to reimburse the Special District for its expenses in providing these services. The Special District then sued the Commissioner of Education. The trial court denied relief and the District appealed. In *Special District for the Education & Training of Handicapped Children v. Wheeler*,<sup>56</sup> the Missouri supreme court held, without discussion, that providing speech therapy to pupils in parochial schools does not support or maintain free public schools, and that the use of "public school funds" for that service was invalid under article IX, section 5, of the Missouri constitution.<sup>57</sup>

State-funded therapy programs of the kind invalidated in *Special District* were subsequently held to violate the establishment clause of the first amendment. In *Meek v. Pittenger*,<sup>58</sup> a 1975 case, the United States Supreme Court held that state-funded auxiliary services in parochial schools are constitutionally impermissible.<sup>59</sup> The Court had

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56. 408 S.W.2d 60 (Mo. 1966) (en banc).

57. *Id.* at 63. The court also cited Mo. CONST. art. IX, § 3(b), which provides:

In the event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools.

The court apparently held that appropriations made by the general assembly under article IX, § 3, to provide for the deficiency in the "public school fund" become part of that fund and may be used only to establish and maintain free public schools. By "public school fund," therefore, the court apparently meant the supplemental state funds appropriated under § 3(b) "for public school purposes" in addition to the "public school fund" established by article IX, § 5.

58. 421 U.S. 349 (1975).

59. *Id.* at 369-72. Auxiliary services generally consist of speech therapy, remedial mathematics and reading instruction, psychological testing and diagnostic services, adaptive or corrective instruction in physical education, welfare and health services, and guidance and counseling. The services are designed to improve a handicapped child's ability to learn in a regular manner.

One state court had held that because auxiliary services are "attuned to the needs of the physically, emotionally, and culturally handicapped children," they are not subject to the same objections made against providing teachers for regular subjects "in an informal day-to-day teaching situation." *Protestants & Other Ams. United for Separation of Church & State v. Essex*, 28 Ohio St. 2d 79, 87, 275 N.E.2d 603, 607-08 (1971). The Supreme Court in *Meek* disagreed. According to the Court,

[t]he likelihood of inadvertent fostering of religion may be less in a remedial

already held, in *Lemon v. Kurtzman*,<sup>60</sup> that the state “must be certain . . . that subsidized teachers do not inculcate religion . . . .”<sup>61</sup> The supervision necessary to ensure that such teachers did not “advance the religious mission of the church-related schools in which they serve” would entail a constitutionally impermissible entanglement between church and state.<sup>62</sup> Hence, the auxiliary services could not be provided in a constitutionally acceptable manner.

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arithmetic class than in a medieval history seminar, but a diminished probability is not sufficient . . . .

421 U.S. at 370-71.

60. 403 U.S. 602 (1971). See also *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

61. 403 U.S. at 619-20.

62. 421 U.S. at 370. The excessive entanglement test is based on *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970): “We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.” The excessive entanglement factor was adopted by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a separate test of an unconstitutional method of aiding religion and parochial schools. Although the test was stated originally in terms of an effect, a *potential* effect is now apparently sufficient to invalidate the aid.

The Court’s analysis appears to follow a warped syllogism: Is there anything in the aid program which, under any circumstances, might potentially foster religion? If so, the state must engage in constant surveillance of the procedure to ensure that state funds do not promote religion. The constant surveillance, however, constitutes excessive entanglement between church and state. Thus, any aid program with *any* potential, however miniscule, for promoting religion is unconstitutional.

The fallacy in this logic is that a negative answer to the initial question is impossible. “Certainty is an impossible standard to meet . . . .” *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 108 (1975). In *Traverse City School Dist. v. Attorney General (In re Proposal C)*, 384 Mich. 390, 185 N.W.2d 9 (1971), the Michigan supreme court applied a more realistic test—a rule of “reasonable likelihood” to determine whether sending public employees into parochial schools would foster religion or create excessive church-state entanglement. The court held such a procedure constitutional because “the possibility of excessive involvement in religious affairs is, of course, at most, minimal.” *Id.* at 420, 185 N.W.2d at 22.

In *Meek*, Chief Justice Burger, dissenting on the auxiliary services issue, asserted that the Court’s holding “literally turns the Religion Clauses on their heads.” 421 U.S. at 387. He thought the decision would force parents, other than the affluent, “to make a choice between . . . their children’s spiritual needs and their temporal need for special remedial learning assistance,” and that such a result is a “denial of equal protection to children in church-sponsored schools . . . .” *Id.*

Justice Rehnquist, dissenting on auxiliary services, castigated the majority for finding excessive entanglement without relying on any established facts:

The burden of proof ordinarily rests upon the plaintiff, but the Court’s conclusion that the dangers presented by a state-subsidized guidance counselor are the same as those presented by a state-subsidized chemistry teacher is apparently no more than an *ex cathedra* pronouncement on the part of the Court, if one may use that term in a case such as this, since the District Court found the

After *Special District* and prior to *Meek*, it was unclear if the Missouri constitution would allow the state to spend money not derived from the "public school fund" for auxiliary services in parochial schools. The question is now moot. Whether Missouri may constitutionally provide auxiliary services to parochial school pupils in places other than the parochial school is unresolved. A logical, and possibly economical, alternative would be provision of such services to all students, public and parochial, at a single public school. The Supreme Court hinted in *Meek* that such a solution would not offend the first amendment.<sup>63</sup>

After the state Commissioner of Education refused to reimburse the Special District for services provided in the parochial schools, the Special District altered its program, permitting parochial students to spend part of the school day at District buildings receiving speech therapy. This program would presumably satisfy the first amendment as construed in *Meek*. In the second part of *Special District*, however, the Missouri supreme court held that this practice violated the state's compulsory attendance law. Consequently, the District was not entitled to reimbursement for its expenses. Missouri's compulsory attendance law requires every child between the ages of seven and sixteen to "attend regularly some day school."<sup>64</sup> The school day is elsewhere defined as six hours of

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facts to be exactly the opposite—after consideration of stipulations of fact and an evidentiary hearing . . .

421 U.S. at 391-92 (Rehnquist, J., concurring and dissenting). The Court considered two other types of aid in *Meek*. The Court sustained a statutory provision for loaning secular textbooks to students in parochial schools because the relevant Pennsylvania statute was

in every material respect identical to the loan approved in [Board of Educ. v. Allen, 392 U.S. 236 (1968)]. Pennsylvania, like New York, "merely makes available to all children the benefits of a general program to lend school books free of charge."

421 U.S. at 362.

The Court invalidated a statute that provided for the free loan of instructional materials and equipment directly to qualifying nonpublic schools because it had "the unconstitutional primary effect of advancing the religious character of the schools benefiting from the Act." *Id.* at 363.

63. The Court said that it did "not question . . . the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools." 421 U.S. at 368 n.17. See Rabinove, *Does "Dual Enrollment" Violate the First Amendment?*, 3 J. L. & Educ. 129 (1974). *But cf.* Thomas v. Schmidt, 397 F. Supp. 203 (D.R.I. 1975); Americans' United for Separation of Church & State v. Paire, 359 F. Supp. 505, 510-11 (D.N.H. 1973); Fisher v. Clackamonus County School Dist., 13 Ore. App. 56, 507 P.2d 839 (1973).

64. Mo. REV. STAT. § 167.031 (1969).



teaching.<sup>65</sup> Although the purpose of compulsory attendance laws is to assure that children receive a minimum amount of education,<sup>66</sup> the court in *Special District* believed that these statutes unambiguously required the children to attend one and only one school for the allotted six hours.<sup>67</sup> The court declared that the involvement of parochial school pupils was "incidental" to its decision,<sup>68</sup> but the dissent noted several instances in which a similar application of the legislation would produce anomalous results if only public school pupils were involved.<sup>69</sup> The inference is that provision of services to parochial school students was the real target of the court's ruling.

There are three means to avoid the court's peculiar construction of the compulsory attendance law. The statute expressly provides that a "mentally or physically incapacitated" child need not attend school for the full time otherwise required.<sup>70</sup> Handicapped students could thus attend a parochial school for less than six hours per day while receiving therapy at a public school during the rest of the day.<sup>71</sup> A child

65. MO. REV. STAT. § 160.041 (1969).

66. *Morton v. Board of Educ.*, 69 Ill. App. 2d 38, 45, 216 N.E.2d 305, 308 (1966); accord, *Special Dist. for the Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60, 67 (Mo. 1966) (Finch, J., concurring and dissenting).

67. 408 S.W.2d at 64. The court stated:

We are asked to change the statutory requirement to read "some day schools" or to read "some day school or schools." We cannot do this. We find no ambiguity which would permit us to judicially ascertain the legislative intent. We must apply the statute as written.

*Id.* at 63.

68. *Id.* at 64.

69. Judge Finch, dissenting, argued that, under the majority's interpretation of the statute, a family would violate the compulsory attendance statute if it moved from one community to another during the school year, or transferred a child from one school to another in the same district to relieve overcrowding or to utilize special facilities. *Id.* at 66. (Finch, J., concurring and dissenting). The majority's interpretation would also require a ruling that releasing students from school for a certain period each day in order to take advanced courses in a junior college would violate the statute. *Id.*

70. MO. REV. STAT. § 167.031 (1969):

(1) A child who, to the satisfaction of the superintendent of schools of the district in which he resides, or if there is no superintendent then the chief school officer, is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof . . . .

71. The plaintiffs in *Special District* argued that this provision was applicable, but the court rejected the argument because the formal "determination" to which the statute refers had not been made. 408 S.W.2d at 64. The court's response seems unduly technical. The pupils involved were obviously "incapacitated" to some degree, since they

might also attend one school for the required six hours, then transfer to a public school to receive auxiliary services.<sup>72</sup> Finally, the legislature could amend the statute to permit a child to attend one or more accredited schools for at least six hours each school day.

If any of these proposals were adopted, the supreme court would undoubtedly then rule on the constitutionality of dual enrollment.<sup>73</sup> A fair reading of the Missouri constitution supports such a scheme. First, every child has a right to attend a public school;<sup>74</sup> a decision also to attend private schools should not forfeit that right. Second, parochial schools and organized religion do not benefit, either directly or indirectly, from such services.<sup>75</sup> Nor should article IX, section 5, invalidate dual enrollment of handicapped children;<sup>76</sup> the children are part of the public school student body when receiving services at the public school. Finally, dual enrollment would not violate article IX, section 8,<sup>77</sup> which provides spending public funds in aid of a sectarian purpose. The

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were receiving speech therapy. Had such a "determination" been made, "the constitutional validity of the practice could be subjected to judicial scrutiny." *Id.*

72. The Missouri Attorney General has ruled that this is a legitimate application of the statute and *Special District*. See OP. MO. ATT'Y GEN. NO. 144 (Nov. 26, 1971).

73. See OP. MO. ATT'Y GEN. NO. 133 (Oct. 28, 1971), which held that students not within the ages covered by the compulsory attendance law could attend public vocational schools part of the school day and nonpublic (parochial) schools for the remainder of the school day.

First, the Attorney General stated that dual enrollment would not violate MO. CONST. art. IX, § 5, see note 15 *supra*, because "public funds were spent exclusively for the support and maintenance of a public vocational school." OP. MO. ATT'Y GEN. NO. 133 at 15 (Oct. 28, 1971). Second, the Attorney General stated that the practice would not violate either MO. CONST. art. I, § 7, see note 13 *supra*, or art. IX, § 8, see note 17 *supra*, because any aid to parochial schools through the practice was incidental. The United States Constitution does not prohibit incidental aid to parochial schools, and the Missouri constitution, while more explicit, does not prohibit all public appropriations that might incidentally benefit parochial schools. OP. MO. ATT'Y GEN. NO. 133 at 17 (Oct. 28, 1971).

In *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975), the Missouri supreme court held that the provisions in the Missouri constitution prohibiting aid to parochial schools are more restrictive than the first amendment.

74. See MO. CONST. art. IX, § 1(a); *Lehew v. Brummell*, 103 Mo. 546, 15 S.W. 765 (1891); *State ex rel. Roberts v. Wilson*, 221 Mo. App. 9, 297 S.W. 419 (1927).

75. One could argue that parochial schools are "aided" because they are relieved of costs that would be incurred if they provided such services to children. This "aid" to parochial schools is so incidental, however, that it should survive constitutional scrutiny. See Note, *Shared Time: Indirect Aid to Parochial Schools*, 65 MICH. L. REV. 1224, 1229 (1967).

76. See note 15 *supra*.

77. See note 17 *supra*. See also OP. MO. ATT'Y GEN. NO. 133 (Oct. 28, 1971).

legislature has declared a public policy to provide *all* handicapped children with such special services as will enable them to maximize their capabilities.<sup>78</sup> Permitting dual enrollment would advance this purely secular interest, provided only that handicapped children normally attending public schools had access to the same services. The state would then provide secular services to all handicapped children. Should the state also desire to provide services to nonhandicapped children, the dual enrollment scheme would apparently permit it, provided only that the services bore some relationship to a valid public interest and were offered equally to all.

The most recent Missouri case considering state aid to parochial education is *Paster v. Tussey*.<sup>79</sup> In *Paster*, the court invalidated a statute authorizing textbook loans to any school pupil or teacher "without [regard to] the school attended."<sup>80</sup> The statute allowed use of the incidental funds to buy textbooks for public school pupils,<sup>81</sup> but required textbooks for nonpublic school students and teachers to be financed from the state's "free textbook fund."<sup>82</sup> The source of the "free textbook fund" was a Missouri tax on foreign insurance companies.<sup>83</sup> The statute expressly prohibited use of any of the article IX, section 5, public school fund for the purchase of textbooks and forbade the loan of textbooks for use "in any form of religious instruction or worship."

The trial court held that the textbook loans to parochial school teachers violated article I, sections 6 and 7, of the Missouri constitution<sup>84</sup> by providing direct assistance to teachers of religion. This finding was not seriously challenged on appeal and was summarily affirmed by the supreme court.<sup>85</sup> The trial court upheld, however, the textbook loans to students. Plaintiffs appealed this finding to the Missouri supreme court.

Respondents advanced two major arguments in support of textbook loans to students. First, respondents asserted that article IX, section 5, was inapplicable because the supporting funds were derived, not

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78. See MO. REV. STAT. § 162.670 (Supp. 1975).

79. 512 S.W.2d 97 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975).

80. MO. REV. STAT. § 170.051 (Supp. 1973).

81. *Id.* See note 52 *supra*.

82. MO. REV. STAT. § 170.051.7 (Supp. 1973).

83. 512 S.W.2d at 99. See MO. REV. STAT. § 148.340 (1969).

84. See notes 12 & 13 *supra*.

85. 512 S.W.2d at 104.

from the "public school fund," but from a tax on foreign insurance companies. Consequently, these tax proceeds could be spent for purposes other than establishing or maintaining public schools.<sup>86</sup> The dispute between the parties thus centered on the definition of "public school fund,"<sup>87</sup> an issue *McVey* should have settled. The *Paster* court again avoided the issue and refused to decide the applicability of article IX, section 5, to the free textbook fund.<sup>88</sup>

The bulk of the court's opinion dealt with the "child benefit theory," respondents' second major argument for textbook loans. This theory asserts that loans made directly to children, rather than to parochial schools, do not constitute aid to, or support of, religious institutions. "The law merely makes available to all children the benefits of a general program to lend school books free of charge."<sup>89</sup> The United States Supreme Court has sustained a similar textbook loan program on precisely this reasoning.<sup>90</sup>

86. *Id.* at 102.

87. *Id.* at 102-03.

88. *Id.* at 103.

89. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

90. *Id.* The Supreme Court first indicated that benefits provided directly to pupils would survive constitutional scrutiny in *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930). Because the first amendment had not been made applicable to the states, the Court held only that secular textbook loans to pupils of both public and parochial schools neither constituted "a taking of private property for a private purpose" nor violated the due process clause of the fourteenth amendment to the United States Constitution. *Id.* at 374. Quoting from the state court decision that it affirmed, the Court stated:

The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

*Id.* at 374-75, quoting *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 1020, 123 So. 655, 660-61 (1929).

In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court held that the child benefit theory is also valid under the first amendment. Approving public financing of bus transportation for parochial school pupils, the Court stated:

The State contributes no money to the [parochial] schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

*Id.* at 18. See also note 43 *supra*.

In *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court indicated that application

The Missouri supreme court, however, refused to apply the child benefit theory in the same fashion as the United States Supreme Court. Assuming without deciding that the Missouri constitution would recognize the child benefit theory,<sup>91</sup> the court thought it necessary to determine if the benefit to the child itself aided a sectarian purpose. Since the recipients of the textbook loans attending parochial schools unquestionably intended to use the books in those schools, the court held the recipients had a sectarian purpose—education in religious schools—advanced by the state aid.<sup>92</sup> Consequently, the court found the loans to be state expenditures in aid of a sectarian purpose in violation of article IX, section 8.<sup>93</sup>

The opinion rests on two necessary premises. The first is the court's conclusion that it

is readily apparent that the provisions of the Missouri Constitution declaring there shall be separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution.<sup>94</sup>

This conclusion is necessary because the United States Supreme Court in *Board of Education v. Allen*<sup>95</sup> explicitly upheld a virtually identical textbook loan program.<sup>96</sup> The Missouri supreme court's hint<sup>97</sup> that a later decision in *Norwood v. Harrison*<sup>98</sup> limited this rule is incorrect. In *Norwood*, the Court invalidated a textbook loan program to students at private, racially segregated schools. The Court reasoned that the

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of the child benefit theory under the first amendment is not restricted to health, safety, and welfare measures. Sustaining a New York statutory program for free loans of secular textbooks to students in all schools, the Court asserted:

The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

*Id.* at 243-44 (footnote omitted).

91. 512 S.W.2d at 104.

92. *Id.* at 104-05.

93. Mo. CONST. art. IX, § 8.

94. *Id.* at 101-02.

95. 392 U.S. 236 (1968).

96. *Id.*

97. 512 S.W.2d at 103.

98. 413 U.S. 455 (1973).

loans inevitably benefited the private schools by providing part of the inescapable costs of education. Thus, the state was promoting racial segregation in education through indirect means.<sup>99</sup>

*Allen* and *Norwood* are entirely compatible since the latter relied on and reaffirmed the former.<sup>100</sup> The end in *Allen*, aiding all school children through provision of free textbooks, was constitutional, and the means, a nondiscriminatory loan program, passed the *Schempp* test of a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>101</sup> The end in *Norwood* was the preservation of racial segregation, a constitutionally impermissible goal. A constitutional means will not save an invalid end.<sup>102</sup> Moreover, incidental benefits to religious organizations do not necessarily render the program unconstitutional.<sup>103</sup> Since courts more closely scrutinize cases involving race, even indirect state action in support of racial discrimination is constitutionally suspect.<sup>104</sup> The Missouri supreme court ultimately agreed that the United States Constitution does not prohibit a textbook loan program: "[D]isposition of the instant case is not controlled by federal law . . . . We return to Missouri law to resolve the issues presented . . . ." <sup>105</sup>

Thus, a necessary element in the court's reasoning was its conclusion that the Missouri constitution is more restrictive in church-state relations than the first amendment. The cases cited in the opinion do not support this proposition. The court quoted at length from both *Harfst v. Hoegen*<sup>106</sup> and *Berghorn v. Reorganized School District Number 8*,<sup>107</sup> emphasizing the language in *Harfst* that asserted an absolute separation of church and state in educational matters.<sup>108</sup> The language in both opinions is dicta. In each case a local school district incorporated a church school into the public system without eliminating the religious training. Such actions plainly violate the first amendment as well as the Missouri constitution. Despite the broad language in

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99. 413 U.S. at 464.

100. 512 S.W.2d at 106 (Bardgett, J., dissenting).

101. *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

102. 512 S.W.2d at 106 (Bardgett, J., dissenting).

103. *Id.* at 108.

104. 1975 WASH. U.L.Q. 1111, 1115 & n.14.

105. 512 S.W.2d at 104.

106. 349 Mo. 808, 163 S.W.2d 609 (1942) (en banc).

107. 364 Mo. 121, 260 S.W.2d 573 (1953). See note 28 *supra*.

108. 349 Mo. at 817, 163 S.W.2d at 614.

*Harfst*, the holdings of these cases do not establish that the Missouri rule is more stringent than the federal rule.

The *Paster* court next cited *McVey* for the proposition that transporting students to parochial schools with public school funds is unconstitutional.<sup>109</sup> Article IX, section 5, on its face flatly prohibits aid to parochial schools and students from the public school fund. Although this section is more restrictive than the first amendment, it is limited to the "public school fund" and does not support the proposition that all public spending in Missouri is subject to stricter limitations. The textbook loans in *Paster* were funded through a tax on foreign insurance companies. Unless the court defines "public school fund" to include all public spending for educational purposes, *McVey* does not impose stricter limits than the first amendment on public spending not derived from the public school fund.

The *Paster* court also cited *Special District* as reaffirming *McVey*, albeit on different facts.<sup>110</sup> In light of *Meek v. Pittenger*,<sup>111</sup> however, *Special District* does not impose stricter constitutional limitations on the Missouri legislature than does the first amendment. Auxiliary services in the parochial schools, held unconstitutional in *Special District*, also violate the first amendment.<sup>112</sup> Provision of such services at the public school, a solution approved in *Meek*,<sup>113</sup> was rejected in *Special District* on statutory, not constitutional grounds.<sup>114</sup>

The court's final authority was *McDonough v. Aylward*<sup>115</sup> in which the Missouri supreme court held that the state was not compelled to provide property tax credits to parents of children enrolled in parochial schools. Since the United States Supreme Court had previously held that income tax credits to such persons violated the first amendment,<sup>116</sup> *McDonough* hardly supports the proposition that the Missouri constitution is stricter than the first amendment. Despite broad language, then, the cases do not support the argument that the Missouri constitu-

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109. 512 S.W.2d at 101.

110. *Id.*

111. 421 U.S. 349 (1975).

112. *Id.* at 372.

113. *Id.* at 368 n.17.

114. *Special Dist. for the Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60, 63-64 (Mo. 1966).

115. 500 S.W.2d 721, 723 (Mo. 1973).

116. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 793-94 (1973).

tion imposes more stringent church-state separation requirements than the first amendment.

The second principle underlying the decision was the court's version of the child benefit theory. The court evidently believed that article IX, section 8, prohibiting any public expenditures "in aid of any religious creed, church, or sectarian purpose" or to "help to support or to sustain any private or public school . . . controlled by any religious creed, church or denomination," required a more thorough analysis of the child benefit theory than other courts had provided. Because many state constitutions contain similar language, several state supreme courts have considered the child benefit theory in the context of language at least as restrictive as that of the Missouri constitution. Since *Paster* was a case of first impression, the Missouri supreme court should have carefully examined these cases for insights about the child-benefit theory.

Several courts have rejected the child benefit theory as inconsistent with state constitutional limitations on church-state relations.<sup>117</sup> Such courts have relied upon three different rationales to reach this result. The first rationale asserts that aid to children attending parochial schools is inconsistent with the intent of the state constitution. *Spears v. Honda*,<sup>118</sup> which overturned a state program of transportation assistance to parochial students, exemplifies this approach. In *Honda*; the Hawaii supreme court examined the debates on the Hawaii constitution which prohibits public spending "for the support or benefit of any sectarian or private educational institution." The legislative history of the section disclosed that the delegates had specifically discussed the transportation program under attack, concluded that the section disallowed it, and rejected a proposed amendment.<sup>119</sup>

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117. *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 717 (1923); *Green v. Frazier*, 253 U.S. 233 (1920); *State ex rel. Traub v. Brown*, 6 W.W. Harr. 181, 172 A. 835 (Del. 1934); *Spears v. Honda*, 51 Hawaii 1, 449 P.2d 130 (1968); *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957 (1972); *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938); *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941); *School Dist. v. Houghton*, 387 Pa. 236, 128 A.2d 58 (1956); *Visser v. Nooksack Valley School Dist.*, 33 Wash. 2d 699, 207 P.2d 198 (1949); *Mitchell v. Consolidated School Dist.*, 17 Wash. 2d 61, 135 P.2d 79 (1943); *State ex rel. Van Straten v. Milquet*, 180 Wis. 109, 192 N.W. 392 (1923).

118. 51 Hawaii 1, 449 P.2d 130 (1968).

119. *Id.* at 8-12, 449 P.2d at 135-37. See also *Gaffney v. State Dep't of Educ.*, 192 Neb. 358, 220 N.W.2d 550 (1974); *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974).



*Epeldi v. Engelking*<sup>120</sup> adopted a variant approach to determining constitutional intent. In *Epeldi*, the Idaho supreme court construed the meaning of article 9, section 5, of the Idaho constitution, which is virtually identical to the Missouri section considered in *Paster*.<sup>121</sup> In overruling a state transportation program, the court rejected the child benefit theory on the following grounds:

By the phraseology and diction of this provision it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. Had that not been their intention there would have been no need for this particular provision . . . .

. . . The requirements of this constitutional provision thus eliminate . . . the child benefit theory.<sup>122</sup>

Had the Missouri supreme court considered these cases in conjunction with the debates at the Missouri constitutional convention in 1875, it would have produced a more defensible decision.

The Missouri supreme court has not relied on constitutional history to interpret the church-state relations provisions of the Missouri constitution.<sup>123</sup> The intent of the framers of article IX, section 8, is obscure. The section originated as an amendment to the Missouri constitution, approved in 1870 by a margin of 200,000 votes,<sup>124</sup> and was copied verbatim from the 1875 constitution.<sup>125</sup> At the 1875 constitutional convention, discussion of the section was limited almost exclusively to whether the word "person" should be retained between "institution of learning controlled by any" and "religion, creed, church or sectarian denomination whatever . . . ." The word "person"

120. 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957 (1972).

121. Compare Mo. CONST. art. IX, § 8, with IDAHO CONST. art. 9, § 5:

Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose.

122. 94 Idaho at 395-96, 488 P.2d at 865-66.

123. Tockman, *supra* note 43, at 474 n.55.

124. See IX DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 328-29 (I. Loeb & F. Shoemaker ed. 1942).

125. Journal of the Constitutional Convention of Missouri 1943-44, Mar. 10, 1944, at 9.

eventually was deleted; the word "religion" was changed to "religious" and the comma before "creed" was omitted. There was no discussion of the meaning of aid for a "sectarian purpose."<sup>126</sup>

The 1943-44 convention did discuss the reasons for including both article I, section 7, banning public aid to religion in any form, and article IX, section 8, banning aid to any church-sponsored school. The apparent purpose was to reaffirm in most explicit terms the constitutional prohibition on aid to religious education.<sup>127</sup> The duplicative language does not, however, establish a more stringent Missouri constitutional test of what constitutes aid than does the first amendment, nor does it resolve the question whether aiding parochial school students was intended to constitute aid to the schools. Any attempt to infer an intent to reject the child benefit theory from the language or history of the Missouri constitution is thus likely to be futile.

A second rationale commonly employed to reject the child benefit theory is that state aid to parochial students also benefits the schools, albeit indirectly.<sup>128</sup> Typical of the cases adopting this approach is *Matthews v. Quinton*,<sup>129</sup> a 1961 Alaska decision outlawing state transportation aid to parochial school students. The court rejected a strong argument built on the debates at the constitutional convention<sup>130</sup> and concluded that "the furnishing of such transportation at public expense constitutes a direct benefit to the school."<sup>131</sup> The court relied on Justice Rutledge's dissent in *Everson*: transportation, he thought, was as critical to the effective operation of schools as tuition, teachers' salaries, and buildings. The legislature could not

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126. See IX DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, *supra* note 124, at 328-45.

127. See Tockman, *supra* note 43, at 472-73 n.52. Tockman asserts that the duplicative language was intended to clarify the rule of article IX, section 5, that all public funds for any educational purpose must be limited to the free public schools. *Id.* at 472-74. While not wholly unreasonable, this interpretation is implausible. Had the framers of the Missouri constitution intended such a rule, they had only to extend the public use requirement to *all* public funds for educational purposes, rather than limiting it to the "public school fund."

128. *Matthews v. Quinton*, 362 P.2d 932 (Alas. 1961), *appeal dismissed*, 368 U.S. 517 (1962); *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957 (1972); *Gaffney v. State Dep't of Educ.*, 192 Neb. 358, 220 N.W.2d 550 (1974); *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938).

129. 362 P.2d 932 (Alas. 1961), *appeal dismissed*, 368 U.S. 517 (1962).

130. *Id.* at 943-44.

131. *Id.* at 941.

select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about.<sup>132</sup>

Other courts have applied this rationale to reject textbook loans to parochial school students.<sup>133</sup>

In *Paster*, the Missouri supreme court adopted a peculiar version of this rationale. The court recognized that the primary beneficiaries of the aid would be the children receiving it, but these children would employ the aid to advance a sectarian purpose—obtaining a religious education. Thus, the state, by assisting individual recipients who believe in a religion, would make easier the practice of that religion. According to *Paster*, this result is unconstitutional aid to a sectarian purpose.<sup>134</sup>

A third, closely related reason for rejecting the child benefit theory is that every expenditure on behalf of a religious organization benefits believers; consequently, accepting the child benefit theory would impose no restraint whatever on state aid to religion.<sup>135</sup> *Dickman v. School District No. 62C*<sup>136</sup> is illustrative of these cases. *Dickman* held a textbook loan statute unconstitutional under article I, section 5, of the Oregon constitution which prohibits the use of public funds “for the benefit of any religious [*sic*] or theological institution.”<sup>137</sup> The court reasoned:

The difficulty with this theory is, however, that unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are of benefit to the pupil.<sup>138</sup>

Both the second and third rationales for rejecting the child benefit theory, especially as applied in *Paster*, prove too much. If these rationales are correct, the state may supply no service whatsoever to any religious institution since any services would benefit, however indi-

132. *Id.*, quoting *Everson v. Board of Educ.*, 330 U.S. 1, 48 (1946) (Rutledge, J., dissenting).

133. *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975); *Gaffney v. State Dep't of Educ.*, 192 Neb. 358, 220 N.W.2d 550 (1974).

134. 512 S.W.2d at 104-05.

135. *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938); *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1942); *Dickman v. School Dist. No. 62C*, 232 Ore. 238, 366 P.2d 533 (1961).

136. 232 Ore. 238, 366 P.2d 533 (1961).

137. *Id.* at 246, 366 P.2d at 537.

138. *Id.* at 250, 366 P.2d at 539-40.

rectly, the practice of religion.<sup>139</sup> If the *Paster* rule is good law, the state cannot aid in any way any individual who believes in a religion since such aid could assist him in fulfilling his religious beliefs. The New York Court of Appeals recognized this anomaly in overruling *Judd v. Board of Education*<sup>140</sup> which had been characterized as the "leading case rejecting the child benefit theory."<sup>141</sup>

Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. . . . [A literal interpretation of the Blaine Amendment] would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools.<sup>142</sup>

If *Paster* is correct, parochial school students cannot use public libraries for class assignments because this assists their efforts to acquire a religious education. Police and fire protection for parochial schools is constitutionally impermissible because it assists the practice of religion. Public buslines may not transport students to parochial schools nor worshippers to their churches or temples because such state action assists their efforts to fulfill their religious beliefs.

The more thoughtful decisions have recognized this inherent tension between unconstitutional support of religion and arbitrary denial of public services.<sup>143</sup> Those courts adopting a child benefit theory have developed the qualifying tests recommended by *Dickman* to ensure that any support for sectarian purposes remains incidental to servicing the needs of people who believe in the particular religion. The most

139. See *Bowker v. Baker*, 73 Cal. App. 2d 653, 665-67, 167 P.2d 256, 262-63 (1946).

140. 278 N.Y. 200, 15 N.E.2d 576 (1938).

141. *Dickman v. School Dist. No. 62C*, 232 Ore. 238, 251, 366 P.2d 533, 540 (1961).

142. *Board of Educ. v. Allen*, 20 N.Y.2d 109, 115-16, 228 N.E.2d 791, 794, 281 N.Y.S.2d 799, 803-04 (1967), *aff'd on other grounds*, 392 U.S. 236 (1968).

143. See *Bowker v. Baker*, 73 Cal. App. 2d 653, 663, 167 P.2d 256, 260 (1946) (transportation); *Nichols v. Henry*, 301 Ky. 434, 443-44, 191 S.W.2d 930, 934-35 (1945) (transportation); *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 1020, 123 So. 655, 660 (1929), *aff'd sub nom.*, *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (textbooks); *Adams v. County Comm'rs*, 180 Md. 550, 555, 26 A.2d 377, 379 (1942) (transportation); *Board of Educ. v. Wheat*, 174 Md. 314, 319, 199 A. 628, 631 (1938) (transportation); *Chance v. Mississippi State Textbook Rating & Purchasing Bd.*, 190 Miss. 453, 464, 200 So. 706, 712 (1941); *Everson v. Board of Educ.*, 133 N.J.L. 350, 354, 44 A.2d 333, 336 (Ct. Err. & App. 1945), *aff'd*, 330 U.S. 1 (1930), *rev'g* 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944) (transportation). See also *Cushman, Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 347-51 (1950); *La Noue, supra* note 50; *Tockman, supra* note 43, at 484-91 n.91.

common test is the legislative purpose in passing the statute. The reasoning of the New York Court of Appeals in *Allen v. Board of Education*<sup>144</sup> is of particular interest because article XI, section 3, of the New York constitution imposes more stringent limitations than the Missouri constitution:

Neither the State nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance . . . of any school . . . wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.<sup>145</sup>

Notwithstanding the ban on indirect aid to religious institutions, the court found in a textbook loan program a legislative purpose merely to benefit children:

Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.<sup>146</sup>

The Louisiana supreme court, construing a constitutional provision banning public support of sectarian schools, employed a similar analysis to reach a similar conclusion.<sup>147</sup>

The Missouri supreme court ignored the plain purpose of the textbook statute challenged in *Paster*. The court evidently assumed without any evidence that the state legislature had some "nefarious purpose"<sup>148</sup> to aid religion rather than recipients of the loans. Moreover, the court refused to consider whether textbook loans would, in fact, encourage more parents to send their children to parochial schools. Absent such effect the statute would not benefit religious organizations at all, but would merely reduce the financial hardship on believers in a particular religion.

A second test of the legitimate application of the child benefit theory

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144. 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *aff'd on other grounds*, 392 U.S. 236 (1968).

145. N.Y. CONST. art. XI, § 3.

146. 20 N.Y.2d at 116, 228 N.E.2d at 794, 281 N.Y.S.2d at 804.

147. *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 1017-20, 123 So. 655, 660 (1929), *aff'd sub nom.*, *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930). *See also* *Chance v. Mississippi State Textbook Rating & Purchasing Bd.*, 190 Miss. 453, 200 So. 706 (1941).

148. *Cf. Board of Educ. v. Allen*, 20 N.Y.2d 109, 116, 228 N.E.2d 791, 794, 281 N.Y.S.2d 799, 804 (1967), *aff'd on other grounds*, 392 U.S. 236 (1968).

focuses on the capacity in which the religious institution benefits from the state program. *Dickman* employed such a standard, albeit in striking down a textbook loan program.<sup>149</sup> This test recognizes that the state cannot assist the religious functions of religious institutions, but may constitutionally provide them services in their secular capacity. Thus, police and fire services are legitimate because they protect private property that *happens to belong* to churches. Public buslines may transport children to parochial schools because the service benefits directly children who *happen to belong* to a particular religion. Under this test the issue is whether textbook loans assist a religious or secular function. For example, so long as a text relates only to secular subjects, it does not aid religious instruction. The parochial education process may in general inculcate religious values, but providing secular texts aids such teaching no more than providing fire services.<sup>150</sup> A chemistry text is not a catechism. Regrettably, the *Paster* court ignored such a functional analysis of the textbook program.

Finally, the United States Supreme Court has developed a three-part test of the legitimacy of state aid to religious institutions. Such aid must have a secular purpose, a primary effect that does not advance the religious cause, and must not involve excessive entanglement of church and state.<sup>151</sup> Because the Missouri constitution does not necessarily impose more stringent limitations than the first amendment,<sup>152</sup> the *Paster* court could have adopted the child benefit theory, using the Court's three-part test to avert excessive state involvement in parochial schools. Such an analysis would have sustained the textbook loan pro-

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149. *Dickman v. School Dist. No. 62C*, 232 Ore. 238, 256-57, 366 P.2d 533, 543 (1961), *citing* *Cushman*, *supra* note 143, at 348.

150. *See* *Board of Educ. v. Allen*, 20 N.Y.2d 109, 116, 228 N.E.2d 791, 794, 281 N.Y.S.2d 799, 894 (1967), *aff'd on other grounds*, 392 U.S. 236 (1968). Professor Freund distinguishes the two situations on the ground that when the state loans textbooks to parochial school pupils for use in a parochial school, the parochial school chooses the books, its teachers interpret the books, and the books are used in a religious atmosphere, whereas public libraries are "managed by public authorities not delegating responsibility for selection of books or personnel or symbolic decor to any religious group." Freund, *supra* note 6, at 1683. Those distinctions are unpersuasive. Although parochial schools may select the books they wish to use, their choice of books generally is restricted to a list prepared by the state board of education or to those used in public schools. Furthermore, although library books are stored in and borrowed from public libraries, those books may be taken to parochial schools and read and studied in a religious atmosphere.

151. *See* note 6 *supra*.

152. *See* notes 106-16 *supra* and accompanying text.

vision.<sup>153</sup> The failure to employ it suggests that the Missouri supreme court is less concerned with constitutional mandates than with invalidating any state program that provides any aid, directly or indirectly, to parochial schools.

*Paster v. Tussey* is most significant as an illustration of the Missouri supreme court's fundamental attitude toward aid to parochial education. In this case, the court clearly could have upheld the statute as a constitutional use of legislative power. In contrast to the incorporation of parochial schools into a public school system, considered in *Harfst*, nondiscriminatory lending of secular textbooks to all pupils creates neither obvious aid to religion nor excessive state involvement with the church. In contrast to *McVey* and the first part of *Special District*, none of the public school fund was used for purposes other than supporting public schools. Nor could the court, as it did in the second part of *Special District*, simply construe a statute to prohibit certain aid. The free textbook statute was carefully drafted to avoid technical deficiencies that might invalidate it.<sup>154</sup> Finally, the court could not follow analogous United States Supreme Court precedent. The court's invalidation of the textbook loans, on the broadest possible grounds, clearly indicates that the court will not tolerate any expenditure of state funds that facilitates the continued existence of parochial schools.

So absolute a wall of separation between church and state is not required by either the explicit language of the Missouri constitution or a fair interpretation of such language. Since the rule is judicially construc-

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153. See *Meek v. Pittenger*, 421 U.S. 349, 362 (1975); *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 779 (1967), *aff'd*, 392 U.S. 236 (1968).

154. In enacting § 170.051, the General Assembly was aware of the Missouri cases in which the supreme court invalidated other types of aid. To avoid the possibility of the court interpreting the statute to apply only to public school pupils, "school" was defined as any school, public or nonpublic, in which the requirements of the compulsory attendance law may be fulfilled. *Id.* at ¶ 1. The textbooks were to be loaned to all pupils without discrimination. *Id.* at ¶ 2. Title to, control, and administration of the use of the textbooks was to remain in the public school board, thus preventing any objection that the parochial schools were given outright grants of materials. *Id.* at ¶ 4. The state board of education had sole control over what books could be loaned, thus preventing parochial schools from exercising discretion over any state funds. *Id.* at ¶ 6. Finally, the statute explicitly prohibited the expenditure of any of the article IX, § 5, "public school fund" for the purchase of the textbooks, thus avoiding a violation of article IX, § 5. *Id.* at ¶ 7. See also *Special Dist. for the Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (Mo. 1966); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (Mo. 1953).

ted rather than constitutionally compelled, it is amenable to change through subsequent judicial examination as well as by constitutional amendment. A reevaluation of *Paster* in future decisions of the Missouri supreme court might produce a more defensible result.

### III. STATE LAW AND FEDERAL QUESTIONS

The effects of the Missouri supreme court's interpretation of the state constitution are not limited to state law. Disposition of federal funds under the Elementary and Secondary Education Act<sup>155</sup> are critically

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155. The requirement that local public authorities provide comparable services to private and public schools posed a serious dilemma under the original Title I legislation. As construed in *Wheeler v. Barrera*, 417 U.S. 402 (1974), Title I imposed potentially contradictory requirements on states like Missouri with a strict requirement of separation of church and state. On the one hand, Title I insisted on services to educationally deprived children in parochial schools "comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority." United States Office of Education, Program Guide No. 44 ¶ 4.5 (1968), *quoted in Wheeler v. Barrera*, 417 U.S. 402, 407 (1974). On the other hand, the legislative history made it clear that state statutory and constitutional limitations applied in this federally funded program. Under *Paster* it is improbable that local authorities could spend any funds to aid parochial school students; under *Special District* it is unquestionable that on-premises teaching services, which were the most effective means of delivering Title I services, were impermissible. *See Barrera v. Wheeler*, 475 F.2d 1338, 1346 (8th Cir. 1973), *aff'd*, 417 U.S. 402 (1974). The state thus faced the unpleasant choice of violating its constitution, terminating the most effective method of providing services to public school students, or withdrawing from the program. *See* 417 U.S. at 423-26.

Recognizing the legal inability of certain states to provide comparable services to educationally deprived parochial school students, Congress amended Title I in 1974. Under the 1974 amendments, if a state or local agency is prohibited by state law from, or simply fails to provide comparable services to parochial school pupils, the federal Commissioner of Education must "bypass" the local agency to provide services to these pupils by other means. 20 U.S.C. § 241e-1(b)(1) (Supp. IV 1974); *see also* H.R. REP. No. 93-805, 93d Cong., 2d Sess. 18 (1974). The cost of services provided to parochial school pupils must be deducted from the allocations otherwise available to local agencies. 20 U.S.C. § 241e-1(b)(3) (Supp. IV 1974).

These amendments might influence the Missouri supreme court to interpret the Missouri constitution to allow Title I services to parochial school students, lest the state receive a smaller Title I allotment. *See* Comment, *The Elementary and Secondary Education Act—The Implications of the Trust-Fund Theory for Church-State Questions Raised by Title I*, 65 MICH. L. REV. 1184, 1203 (1967). In light of *Meek v. Pittenger*, 421 U.S. 349 (1975), such services would have to be provided on public, not private premises. The second consequence of the amendments is that they will expedite a first amendment challenge to Title I in the federal courts by removing the major impact of state constitutional provisions on aid to parochial schools. *See generally* Amdursky, *The First Amendment and Federal Aid to Church-Related Schools*, 17 SYRACUSE L. REV. 609 (1966); Drinan, *Reflections on the Implications of Title I of the Elementary and*



influenced by state law. Moreover, the prohibition of any aid to children attending parochial schools raises federal constitutional questions. So absolute a wall between church and state may unconstitutionally infringe upon the free exercise of religion and may violate the fourteenth amendment guarantee of equal protection. Although federal courts have not yet accepted either argument, neither have they been confronted with the extremely severe rule enunciated in *Paster*. Arguably, therefore, Missouri violates the United States Constitution in enforcing its state constitutional limitation.

Federal courts have twice been asked to hold that Missouri's denial of aid to parochial education violates the Federal Constitution. In *Brusca v. Missouri ex rel. State Board of Education*,<sup>156</sup> a federal district court held that Missouri's policy of funding public schools while prohibiting aid to parochial schools violates neither the free exercise clause of the first amendment<sup>157</sup> nor the equal protection clause of the fourteenth amendment.<sup>158</sup> Although the establishment clause might allow some state aid to parochial schools, the free exercise clause did not require the state to "assist a parent in educating his child religiously with the use of tax-raised money."<sup>159</sup> The court rejected an analogy to *Sherbert v. Verner*,<sup>160</sup> which had held unconstitutional a state regulation conditioning unemployment compensation upon availability for work on Saturdays, thereby violating the basic tenets of petitioner's religion. In *Brusca*, by contrast, plaintiffs had not contended "that attendance at public schools is contrary to the basic precepts or tenets of their religion."<sup>161</sup> Also, the court did not consider a ban on aid to parochial schools to be a violation of equal protection. When public schools are freely available to all, without regard to religious belief, a parent's voluntary decision to send his children to parochial schools "does not deprive him of anything by State action."<sup>162</sup> Consequently, the state need not assist him financially.<sup>163</sup>

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*Secondary Education Act of 1965*, 15 CATH. LAW. 179 (1969); La Noue, *Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities*, 22 RUTGERS L. REV. 219 (1968).

156. 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).

157. See note 6 *supra*.

158. U.S. CONST. amend. XIV, § 1, provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

159. 332 F. Supp. at 279.

160. 374 U.S. 398 (1963).

161. 332 F. Supp. at 279. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

162. 332 F. Supp. at 279.

163. *Id.*

In *Luetkemeyer v. Kaufmann*,<sup>164</sup> another federal court addressed a narrower question—the validity of free transportation for public, but not parochial, pupils—but analyzed more extensively the federal constitutional issues.<sup>165</sup> In addition to arguing that the state policy penalized the free exercise of religion and denied equal protection,<sup>166</sup> plaintiffs argued that denial of equal transportation benefits to pupils and supporters of parochial schools violated the fourteenth amendment due process clause.<sup>167</sup> The court rejected each argument and held that the United States Constitution does not require Missouri to provide transportation for parochial school pupils on the same basis as public school pupils.<sup>168</sup>

The court first determined that the “child benefit” theory, which allows states to provide bus transportation for parochial school pupils,<sup>169</sup> does not *compel* them to do so.<sup>170</sup> Plaintiffs raised two equal protection arguments: first, denial of free transportation to parochial school pupils was “an arbitrary and unreasonable classification;”<sup>171</sup> second, the classification was suspect because it infringed upon “plaintiffs’ fundamental right” to “freely exercise their religion.”<sup>172</sup> The court rejected the second claim decisively: “it cannot be said that one has a federally protected constitutional right to a parochial school education.”<sup>173</sup> Consequently, the classification should be sustained if it

164. 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd mem.*, 419 U.S. 888 (1974).

165. *Id.* at 377. See Mo. REV. STAT. §§ 163.061; 163.161; 165.011; 167.231; 167.251 (1969).

166. 364 F. Supp. at 377-78.

167. *Id.* U.S. CONST. amend. XIV, § 1, provides: “No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”

168. 364 F. Supp. at 387.

169. See *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

170. 364 F. Supp. at 381. Dicta in *Everson* supports the *Luetkemeyer* court's conclusion: “we do not mean to intimate that a state could not provide transportation only to children attending public schools . . . .” 330 U.S. at 16.

171. 364 F. Supp. at 381.

172. *Id.* at 382.

173. *Id.* The court cited *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), for the proposition that public education is not a federally protected constitutional right, and declared that if public education is not constitutionally guaranteed, neither is parochial education. The court's statement is overbroad; one does have a constitutional right to parochial education, provided he is willing to pay for it. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1928). The court should have said, and probably meant to say, that one does not have a constitutional right to a *publicly subsidized* parochial school education.

Plaintiffs argued that they had a constitutional right to attend a parochial school, citing *Pierce*, and that “any classification which serves to penalize the exercise of

promotes a "valid State objective."<sup>174</sup> The court found that Missouri's policy of "maintaining a very high wall between church and state" was a "legitimate State purpose." Denying transportation benefits to parochial school pupils was consistent with and promoted that purpose.<sup>175</sup>

Plaintiffs' due process argument asserted that the state required them to forego their religious beliefs in order to receive transportation to their schools.<sup>176</sup> This argument was based on *Sherbert v. Verner*<sup>177</sup> in which the Supreme Court overturned a South Carolina rule conditioning unemployment compensation on petitioner's willingness to work on Saturdays, a violation of her fundamental religious beliefs.<sup>178</sup> The Court held that such conditions were tantamount to a penalty for religious beliefs, justifiable only by a "compelling state interest."<sup>179</sup>

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[a constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.'" 364 F. Supp. at 382, quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

174. 364 F. Supp. at 382. Consistent with the traditional equal protection approach, the court placed the burden on the plaintiffs to prove that "the classification does not reasonably promote a valid State objective." *Id.*

175. *Id.* at 382-83.

176. *Id.* at 384.

177. 374 U.S. 398 (1963).

178. *Id.* at 406. The Court used a variety of phrases to describe the appellant's reason for refusing to work on Saturday: "conscientious scruples," *id.* at 399; "conscientious objection," *id.* at 403; "precepts of her religion," *id.* at 404; "cardinal principle of her religious faith," *id.* at 406; and "religious convictions," *id.* at 410. The Court's use of these phrases may be relevant to consideration of a parent's decision not to send his children to public schools. While few parents could claim that sending their children to public schools would violate a "cardinal principle of their religious faith," many more parents legitimately could claim that the other phrases used by the Court in *Sherbert* do describe their reason for not sending their children to public schools.

179. *Id.* at 406-09.

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530 [(1945)].

*Id.* at 406. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state's interest in compulsory secondary education is not sufficient to justify infringement of Amish belief that it would be contrary to their religion); *United States v. O'Brien*, 391 U.S. 367 (1968) (state's interest in having individuals register for military draft is sufficient to justify criminal penalties for burning one's draft card, even though first amendment rights are incidentally restricted); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (state's interest in uniform day of rest justifies Sunday closing law that operates to the economic disadvantage of those persons whose religious beliefs compel them to observe Saturday as a day of rest).

The *Lutkemeyer* court found *Sherbert* inapposite for two reasons. First, the Court had not ruled that every state regulation imposing financial hardship on believers in particular religions was invalid.<sup>180</sup> *Sherbert* involved a request for dispensation from a general regulatory law, not a request or demand for a public service.<sup>181</sup> Second, the court concluded that

[t]he long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power . . . .'<sup>182</sup>

Although the Missouri policy made plaintiffs' exercise of their religion more expensive, such a result was justified under the due process clause by Missouri's interest in separation of church and state, "an 'interest of the highest order.'"<sup>183</sup> Accordingly, the court concluded that

[t]he fact that Missouri has determined to enforce a more strict [*sic*] policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question. The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter.<sup>184</sup>

The Supreme Court affirmed the district court without opinion,<sup>185</sup> but with two justices dissenting.<sup>186</sup>

Analysis of these decisions, and of the constitutional power of states

180. 364 F. Supp. at 385.

181. *Id.* Although the court gave no citation, this distinction is taken from Freund, *supra* note 6, at 1688.

182. 364 F. Supp. at 386.

183. *Id.*

184. *Id.*

185. 419 U.S. 888 (1974).

186. Justice White, joined by Chief Justice Burger, believed that denying transportation to parochial school pupils is a denial of equal protection:

The enforcement of church-state separation could in many instances be a valid state interest, but after *Everson* it would be difficult to assert that refusal to extend busing to parochial school children, without more, furthers a legitimate state interest in avoiding church-state entanglements. On the contrary, the "benefits of public welfare legislation"—here a "general program to help parents get their children . . . safely and expeditiously to and from accredited schools," . . . seem to be denied because certain students are seeking religious training. . . . [T]hat classification would violate federal equal protection principles.

to deny certain kinds of aid to parochial schools, requires consideration of two basic assumptions: (1) denial of all aid is a justifiable means to promote separation of church and state, and (2) a parent's decision to send his children to parochial schools is purely voluntary. The constitutional merits of a state's position toward aid to parochial education will, in large measure, depend on the validity of these assumptions.

Although the principle of "separation of church and state" is almost universally acknowledged, it is nearly impossible to ascribe a precise meaning to the phrase. To some people, the principle means that the government may not burden, restrict, or interfere with personal religious beliefs; to others, the principle means that the government may not promote any religion by spending tax-raised money to aid institutions that teach or encourage religious beliefs. Not coincidentally, the first amendment, the constitutional basis for separation of church and state, includes both meanings. As Chief Justice Burger observed in *Walz v. Tax Commission*,<sup>187</sup>

[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.<sup>188</sup>

The Chief Justice resolved the apparent inconsistency by perceiving that the first amendment requires the government to maintain an attitude of "benevolent neutrality" toward religion.<sup>189</sup> Similarly, the first amendment has been characterized as "prohibiting classification in terms of religion either to confer a benefit or impose a burden."<sup>190</sup>

The "benevolent neutrality" suggested by Chief Justice Burger may have different policy implications when applied to supporters of a religion or church than to the church itself. For churches, "benevolent

187. 397 U.S. 664 (1970).

188. *Id.* at 668-69.

189. *Id.* at 669. See also *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) (emphasis added): "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947):

[T]he First Amendment . . . requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than it is to favor them.

(Emphasis added). See generally *Walz v. Tax Comm'n*, 397 U.S. 664, 694-700 (1970) (Harlan, J., concurring).

190. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

neutrality" may require states to avoid any substantial entanglement, whether fiscal, doctrinal or administrative, in church affairs. For individuals, however, neutrality requires the state to treat all persons equally, regardless of religious affiliation. When the state provides auxiliary educational services such as speech therapy to children, "benevolent neutrality" prohibits discrimination between students based on religious affiliation. If access to these services is conditioned on the child's religious beliefs, two constitutionally proscribed consequences follow. First, the state has created a classification based on religion, a possible violation of fourteenth amendment equal protection.<sup>191</sup> Second, by granting benefits only to persons who forego the exercise of their religious preferences, the state may have interfered with the free exercise of religion, also a constitutional violation.<sup>192</sup>

The Missouri supreme court's interpretation of state constitutional provisions relating to religion cannot be squared with Chief Justice Burger's "benevolent neutrality" standard. Both *Paster* and *Special District* create religious classifications.<sup>193</sup> Students who attend parochial schools cannot receive state-supplied auxiliary services or textbooks. To obtain such services, the students and their parents must forego the religious portion of their education.<sup>194</sup>

The second basic assumption is that a parent's decision to send his child to a parochial school is purely voluntary. If basic religious beliefs *require* a parent to send his children to a religious school, the denial of any state aid to parochial education may violate the parents' first amendment rights.<sup>195</sup> These parents have no acceptable alternative to public schools since their religion forbids a public education. Other parents believe that parochial education will enhance their children's religious training. Because a parent's choice of where to educate his children is constitutionally guaranteed,<sup>196</sup> denial of all state aid to parochial

191. *Meek v. Pittenger*, 421 U.S. 349, 386-87 (1975) (Burger, C.J., concurring and dissenting); *cf. Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Everson v. Board of Educ.*, 330 U.S. 1, 14-16 (1946).

192. *Meek v. Pittenger*, 421 U.S. 349, 387 (1975) (Burger, C.J., concurring and dissenting); *cf. Everson v. Board of Educ.*, 330 U.S. 1 (1946).

193. See notes 68-69 and 92-93 *supra* and accompanying text.

194. See notes 194-95 *infra* and accompanying text.

195. *Brusca v. Missouri ex rel. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972); see also *Sherbert v. Verner*, 374 U.S. 398 (1963).

196. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

schools may coerce a religiously-motivated parent into sending his child to a public school. Denial of all state aid may therefore significantly interfere with a parent's right to choose a school for his child and with his right to free exercise of his religion.

#### IV. CONCLUSION

The United States Supreme Court has declared that cases arising under the first amendment's religion clauses present "some of the most perplexing problems to come before the Court."<sup>197</sup> The Court has also stated that cases concerning aid to parochial education "involve an intertwining of societal and constitutional issues of the greatest importance."<sup>198</sup> In contrast, the Missouri supreme court has not considered cases on aid to parochial education arising under Missouri law to be perplexing because it believes that the state constitution unambiguously denies all public aid.<sup>199</sup> Except in *Harfst v. Hoegen*,<sup>200</sup> the court has paid only superficial attention to the social issues involved. The court has utterly failed to consider the present and future effects of denying all aid to parochial education, choosing instead to cast the issue solely as one of law.<sup>201</sup> Whether the court should be lauded for principled constitutional adjudication or rebuked for narrow-minded dogmatism depends on personal belief.

Textbook, transportation and auxiliary service aid to parochial school students is not necessarily proscribed by the Missouri constitution or by the first amendment. By erecting a barrier of absolute separation between religious education and public funding,<sup>202</sup> the Missouri supreme court has failed to adopt the "benevolent neutrality" suggested by the Chief Justice.<sup>203</sup> More importantly, Missouri courts have denied needed educational and therapeutic aid to those who need it.

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197. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

198. *Id.* at 759.

199. *See Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975), *discussed in notes 79-154 supra* and accompanying text.

200. 349 Mo. 808, 814-15, 163 S.W.2d 609, 614 (1942) (en banc), *discussed in notes 19-35 supra* and accompanying text.

201. 349 Mo. at 817, 163 S.W.2d at 614.

202. *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975), *discussed in notes 79-154 supra* and accompanying text.

203. *See notes 188-89 supra* and accompanying text.