Nebraska Law Review

Volume 55 | Issue 1 Article 10

1975

Publicly Funded Transportation for Parochial School Students: New Issues

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Note

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Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[1]

I. INTRODUCTION

America is "one nation under God." We affirm our belief in this concept every time we pledge allegiance to our flag and thereby to our nation. Our coins are imprinted with the words "In God We Trust," another constant reminder of our national commitment to the diety. Yet, running contrary to this strain is our equally firm commitment to the concept of separation of church and state. This heritage reflects our founding fathers' fear of the dangers presented by church interference with state affairs and of the inhibiting effect state involvement would have on religious freedom.[2]

1. 2 WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901).
2. [T]here were really two strains in American thinking that contributed to the idea of church-state relations. One was the contribution made by Madison and Jefferson who, while very much concerned with religious liberty, were chiefly concerned that the state should not be governed by the church. They viewed the establishment clause as an insulator protecting the state from churches seeking favors and preference. But to place this emphasis on the contribution of Madison and Jefferson . . . is to ignore a second strain of thought, the contribution made by Roger Williams of Rhode Island. Williams' thinking was directed to religious liberty which had its source in an inner spiritual freedom, a liberty which could not be sanctioned or nurtured by the state. Williams disowned state supported religion not because of a fear of ecclesiastical influence on the state, but for the opposite reason; namely, that state support would tend to degrade religion and destroy its essential vitality. His interest was in protecting the church and religion from the corrupting influence of the state.

   Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 319 (1973), *quoting* M. HOWE, THE GARDEN AND THE WILDERNESS 1-31 *passim* (1965).

The first amendment to the Federal Constitution was written to afford protection from both of these evils, and the judiciary has staunchly upheld the concepts embodied in it. One manifestation of this had been the reluctance of the United States Supreme Court to permit the use of public funds to support nonpublic education, regardless of the form of such aid. In a landmark decision, *Everson v. Board of Education*,[3] the Court departed from this position and held that a state could furnish bus transportation to children attending nonpublic schools without violating the first amendment. Despite this approbation, subsequent state legislation of a similar nature has still been subjected to judicial scrutiny. The results have been inconsistent as the constitutionality of these statutes has been questioned on the basis of potential violations of the Federal Constitution and of the more restrictive provisions of some state constitutions.[4]

During the last session of the Nebraska Legislature, such a statute was passed. L.B. 522 requires that under delineated circumstances, the state must furnish bus transportation to children attending nonprofit, nonpublic schools. The constitutionality of this statute may soon be challenged in the Nebraska courts as violating

3. 330 U.S. 1 (1947).
4. For state court decisions which have sustained legislation providing for public funds to be used to bus parochial school students see Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1960); Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956); Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945); Squires v. Inhabitants of City of Augusta, 155 Me. 151, 153 A.2d 80 (1959) (dictum); 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); Quinn v. School Comm., 332 Mass. 410, 125 N.E.2d 410 (1955); Alexander v. Bartlett, 14 Mich. App. 177, 165 N.W.2d 445 (1968); Americans United, Inc. v. Independent School Dist. No. 622, 288 Minn. 196, 179 N.W.2d 146 (1970); West Morris Regional Bd. of Educ. v. Sills, 58 N.J. 464, 279 A.2d 609 (1971), *cert. denied*, 404 U.S. 986 (1971); Everson v. Board of Educ., 133 N.J.L. 350, 44 A.2d 333 (1945), *aff'd*, 330 U.S. 1 (1947); Honohan v. Holt, 17 Ohio Misc. 57, 244 N.E.2d 537 (1968); Rhoades v. School Dist., 424 Pa. 202, 226 A.2d 53 (1967), *appeal dismissed*, 389 U.S. 11 (1969); State *ex rel.* Hughes v. Board of Educ., 174 S.E.2d 711 (W. Va. 1970).

For state court decisions invalidating such legislation see Matthews v. Quinton, 362 P.2d 932 (Alas. 1961), *appeal dismissed*, 368 U.S. 517 (1962); Opinion of the Justices, 59 Del. 192, 216 A.2d 668 (1966); State *ex rel.* Traub v. Brown, 36 Del. 181, 172 A. 835 (1934); Spears v. Honda, 51 Hawaii 1, 449 P.2d 130 (1968); Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971); Board of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

the state and federal constitutions. Such litigation will raise several new issues. What are the implications of the most recent United States Supreme Court decision considering public aid to nonpublic schools, *Meek v. Pittenger*?[5] Does *Gaffney v. State Board of Education*,[6] the latest Nebraska Supreme Court decision on public appropriations to nonpublic schools, have continuing validity since the language of Article VII, section 11 of the Nebraska Constitution has been amended?[7]

II. L.B. 522

Section 79-487 of the Nebraska Statutes permitted public school boards to purchase school buses for the purpose of transporting public school children to and from school and school-related activities.[8] L.B. 522 has amended this provision in several ways.

As originally introduced,[9] it mandated that public school dis-

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5. 421 U.S. 349 (1975).
6. 192 Neb. 358, 220 N.W.2d 550 (1974).
7. Appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof.

   All public schools shall be free of sectarian instruction.

   The state shall not accept money or property to be used for sectarian purposes; Provided, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no state money may be added thereto. A religious test or qualification shall not be required of teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.

   NEB. CONST. art. VII, § 11 (emphasis added). This provision of the constitution was amended in 1972. *See* notes 97, 128-30 and accompanying text *infra*.
8. The school board or board of education of any public school district may, when authorized by a majority vote of the members of such board, purchase out of the general fund of the district, a school bus or buses for the purpose of providing transportation facilities for school children to and from school and to and from all school-related activities.

   NEB. REV. STAT. § 79-487 (Reissue 1971).
9. The school board or board of education of any public school district providing such transportation facilities for children attending public schools shall also provide transportation without cost for children who attend private schools which are approved for continued legal operation under rules and regulations established by the State Board of Education pursuant to subdivision (5) (c) of section 79-328. Such transportation for children attending private schools shall extend only from some point on the regular public school route nearest or most easily accessible to their homes to and from a point on the regular public school route nearest or most easily accessible to the school or schools attended by such children. The governing

tricts furnishing such transportation for public school students provide it free to children attending state-accredited private schools as well.[10] Private school children would receive transportation from a point on the regular public school route nearest or most easily accessible to their homes to a point on the regular public school route nearest or most easily accessible to the school they attend, and then back home. The private school officials would furnish the names and addresses of children qualifying for transportation and the days they would be attending school.[11] Private

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> body of such private school, on a form to be provided by the State Department of Education, shall certify to the public school district the names, addresses, and days of school attendance of children transported and such other information useful in operating the transportation facility as may be required by rules established by the State Board of Education. Transportation shall be provided for private school children only at times when transportation is being provided for public school children.

L.B. 522, 84th Neb. Leg., 1st Sess. (first reading Jan. 23, 1975).

10. In 1974-1975 there were 361,545 school children in Nebraska. Of this number 318,672 attended public schools, 41,930 attended nonpublic schools and 943 were in state-operated schools. *See* NEBRASKA STATE DEPARTMENT OF EDUCATION, STATISTICS AND FACTS ABOUT NEBRASKA SCHOOLS (1974-75). The amount spent to furnish school bus transportation for approximately 73,000 to 75,000 public school children was $10,400,000. Approximately 20.44 percent of the children attending public schools in the State of Nebraska during the 1974-1975 school year were transported at public expense. This percentage was based on the figure of 362,000 public school children, of whom 74,000 were bussed by using public funds. Telephone Interview with Peter Soderquist, Nebraska State Department of Education, in Lincoln, Nebraska, Sept. 29, 1975. If the same percentage of children attending nonpublic schools in Nebraska would be eligible for transportation following passage of L.B. 522, the estimated number of nonpublic school children to be transported at public expense would be 8,584. This computation is based on 42,000 children attending nonpublic schools. The average cost per child of transporting public school children was approximately $142.00. Using this figure, it is possible to estimate that the maximum cost of transporting nonpublic school children will be an additional $1,221,200 per year. This method of computation was used by the court in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 380-81 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).

11. As will be shown (see section III *infra*), the use of public funds to pay for textbooks or bus transportation for parochial school children has been justified because the recipients of the benefits are children or their parents. The reasoning has been that if the state did not have to furnish textbooks or provide transportation, then the parents would. The Court has acknowledged that religion does benefit indirectly from such governmental aid to parents and children; nevertheless, "[t]hat religion may indirectly benefit from governmental aid . . . does not convert that aid into an impermissible establishment of religion." Lemon v. Kurtzman, 403 U.S. 602, 664 (1971). The fact that parochial school authorities, rather than parents or children, are usually the ones

school children would receive transportation only on the days when it was being provided for public school children.

Following introduction of L.B. 522, the Education Committee expressed its concern about the constitutionality of the bill by seeking the assistance of the Nebraska Attorney General. An opinion, given on March 3, 1975, indicated that the bill was constitutional.[12]

As passed by the legislature,[13] however, L.B. 522 differs in sev-

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involved in channelling public funds upon request for books and transportation, has not been considered as undermining the child-benefit concept. *See* note 56 *infra*. However, several Justices have recently taken issue with this arrangement and have attempted to view the statutory schemes realistically.

> [I]t is pure fantasy to treat the textbook program as a loan to students. . . . [E]ven the Court acknowledges that "the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials . . . . [T]he regulations implementing Act 195 make clear . . . that the nonpublic school in Pennsylvania is something more than a conduit between the State and pupil. . . . These regulations, unlike those upheld in *Allen*, constitute a much more intrusive and detailed involvement of the State and its processes into the administration of nonpublic schools. The whole business is handled by the schools and public authorities and neither parents nor students have a say. . . . [T]he nonpublic school, not its pupils, is the motivating force behind the textbook loan, and . . . virtually the entire loan transaction is to be, and is in fact, conducted between officials of the nonpublic school, on the one hand, and officers of the state, on the other.

Meek v. Pittenger, 421 U.S. 349, 379-80 (1975) (Brennan, Douglas, & Marshall, J.J., concurring and dissenting).

L.B. 522 provides that private school officials will be responsible for apprising public authorities of which nonpublic school children are to receive bus transportation. Realistically, this is the most expeditious way to ensure that children qualifying for and desiring transportation will have it. It is uncertain whether any court would adopt the Brennan-Douglas-Marshall rationale that utilizing such a system totally undercuts the child-benefit theory and indicates that the public aid is going to the private school and not to the private school children.

12. NEB. ATT'Y GEN. OP. (March 3, 1975).

13. The school board or board of education of any public school district providing such transportation facilities for children attending public schools shall also provide transportation without cost for children who attend nonprofit private schools which are approved for continued legal operation under rules and regulations established by the State Board of Education pursuant to subdivision (5) (c) of section 79-328. Such transportation shall be provided for only such children attending nonprofit private schools who reside in a district which provides transportation to public school students, and such transportation shall extend only from some point on the regular public school route nearest or most easily accessible to their homes to and from a point on the regular public school route

eral notable ways from the bill which the Attorney General had considered to be constitutional. First, in executive session of the Education Committee, the original bill was amended to restrict L.B. 522's applicability to children attending private, *nonprofit* schools. The result of this limitation will be to exclude a small number of students in proprietary schools in Nebraska from receiving the benefits of free school bus transportation.[14] Second, children attending nonprofit private schools will only be bussed if they live in a district which already provides transportation to public school pupils. This provision was inserted to prevent potential problems presented by transporting children who live in a non-contiguous school district.[15] Under the first draft of L.B. 522, when a bus belonging to school district A passed through school district B to pick up children living in a non-contiguous part of school district A, it would have been obligated to pick up school children living along the bus route in school district B. The effect of this would have been to force taxpayers in one district to pay transportation costs for children of another district. Unresolved is the problem presented by nonpublic school children who reside in a Class I school district that does not furnish bus transportation and who live near a bus route operated by the Class VI district in which this particular Class I district is included.[16] L.B. 522 can be interpreted as requir-

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> nearest or most easily accessible to the school or schools attended by such children. The governing body of such nonprofit private school, on a form to be provided by the State Department of Education, shall certify to the public school district the names, addresses, and days of school attendance of children transported and such other information useful in operating the transportation facility as may be required by rules established by the State Board of Education. Transportation shall be provided for nonprofit private school children only at times when transportation is being provided for public school children.

NEB. REV. STAT. § 79-487 (Supp. 1975).

14. There are three schools in Nebraska which are considered to be proprietary schools: The Pratt School of Individual Instruction, Omaha Hearing School, and Brownell-Talbot, all of which are located in Omaha.

15. > [T]he amendment is found on page 1686 of the Journal and essentially what this amendment does is it covers situations involving transportation of students between noncontiguous school districts . . . and a public school bus going in territory that's not a member of the school district that provides the transportation when going through this territory would not be obligated to pick up private school youngsters.

UNICAMERAL TRANSCRIPTS, 84th Leg., 1st Sess. 4817 (May 16, 1975) (remarks of Sen. Frank Lewis).

16. School districts in this state are classified as follows:
(1) Class I shall include any school district that maintains only elementary grades under the direction of a single school board;

ing the bus to pick up the parochial elementary and secondary school children living near the route, even though the public elementary school children similarly situated would not receive transportation.

The Education Committee's apparent intention in passing L.B. 522 was to provide services for *all* children.[17] It was to be public welfare legislation.[18] School bus transportation would be furnished at little extra cost, supposedly because the proposed system would be consistent with *existing* modes of transportation.[19] Buses would run on preexisting routes and would only operate

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. . . .

(6) Class VI shall include any school district in this state that maintains only a high school.

NEB. REV. STAT. § 79-102 (Reissue 1971).

The board in each Class I district decides whether to provide bus transportation. Several Class I districts comprise a Class VI district. The Class VI district furnishes transportation for the children in the various Class I districts who are attending secondary school.

17. In legislative discussion, the issue was raised that failure to provide transportation to all pupils could be a denial of equal protection. *See* notes 74-85 and accompanying text *infra*. The point was also made that the beneficiaries of the proposed legislation were the parents and children and not the schools. The latter argument was made to strengthen the position that the bill was in line with the child-benefit theory. *See* discussion in section III *infra*. *But see* discussion in section IV *infra*.

> If the busing of children to schools had been set up by a county bond or by a county organization rather than under the school board, the Constitution would never have allowed that those children going to private schools be separated and not allowed to ride the school buses. . . . The recipients of this busing are the children and their families and no educational functions whatsoever are performed on these buses. . . . Had it come under a different structure than the school system, the courts would never have allowed one section of students, one section of children and families to be discriminated against by not providing this bus service for them.

UNICAMERAL TRANSCRIPTS, 84th Leg., 1st Sess. 4819 (May 16, 1975) (remarks of Sen. Burrows).

18. > The purpose of LB 522 is to extend the health and safety benefits of school bus transportation to children who attend nonpublic schools. Such transportation would be restricted to the regular public school route, and only on days when the public school is in session. LB 522 requires private school administrators to furnish information needed by the public school board in the operation of their transportation facilities.

Hearings on L.B. 522 Before the Educ. Comm., 84th Leg., 1st Sess. (1975) (statement of purpose). *See* note 38 *infra*.

19. > It provides services for all children. . . . 522 is a no cost bill. It simply provides that children along the route where there is transportation will be entitled to that transportation to that school regardless what school they go to.

Hearings on L.B. 522, supra note 18, at 1-2 (remarks of Sen. Frank Lewis). *See* note 10 *supra*.

while the public schools were in session. In this way, no special concessions would be made to accommodate children attending nonpublic schools. All these provisions reflect the Committee's awareness of the sensitivity of feelings aroused by this type of legislation,[20] as well as a concomitant desire to minimize the financial burden in implementing it,[21] thus lessening its impact on the general community.

Concern over potential constitutional problems raised by L.B. 522 was evidenced in several ways. First, as originally drafted, the bill was patterned after an Illinois statute which provided bussing for all school children.[22] The Illinois bill had already been challenged as violating a restrictive state constitutional provision similar to Nebraska's but its constitutionality had been upheld in *Board of Education v. Bakalis*.[23] Second, as previously discussed,[24] the Committee sought the view of the Nebraska Attorney General regarding constitutionality of the bill.[25] The resulting opinion

20. When the bill was discussed on the floor of the legislature, every effort was made to minimize its potential impact and ramifications of its passage and to emphasize that it was a committee bill, not one presented by special interest groups.

> Mr. Chairman, LB 522 is an Education Committee bill. The bill is a very simple one. The bill provides that students attending a nonpublic school will be provided transportation as are other students in that particular district along the same route. *Let me dispel the myth first that this is a church state issue.* . . . The committee . . . addressed the issue as a transportation issue *and not an education issue.* The question before the body now is whether or not we wish to provide transportation on the same basis for all students regardless where they go to school.

UNICAMERAL TRANSCRIPTS, 84th Leg., 1st Sess. 4815 (May 16, 1975) (remarks of Sen. Frank Lewis) (emphasis added).

21. "Now this is a very sensitive area and the attempt to draft the bill was to provide service that would not incomber [sic] the local district in terms of financial outlay from their position." *Hearings on L.B. 522 Before the Educ. Comm., supra* note 18, at 7-8 (remarks of Sen. Frank Lewis).
22. "We chose the Illinois bill because the state of Illinois has constitutional provisions which if anything are more restrictive in this area than the constitutional provisions in Nebraska's constitution." *Id.* at 10 (remarks of Robert Crosby).
23. 54 Ill. 2d 448, 299 N.E.2d 737 (1973).
24. *See* note 12 and accompanying text *supra.*
25. It would appear that it does not violate the "establishment of religion" clause of the First Amendment of the Constitution of the United States. Everson v. Board of Education . . . . It also appears that it has a secular legislative purpose of protecting health and safety of children traveling to and from nonpublic schools and thus would not violate Section 11 of Article VII of the Constitution of Nebraska, although the same is not free from doubt. See, for example, Board of Education

relied on *Everson* to support the premise that the submitted version of L.B. 522 did not violate the establishment clause of the first amendment to the Federal Constitution; furthermore, because the act had a secular legislative purpose, the Attorney General found no violation of the Nebraska Constitution. In support of this latter position, reference was made to the *Bakalis* decision. After making this seemingly definitive statement about the constitutionality of L.B. 522, the opinion hedged by saying that "the same is not free from doubt."[26] In conclusion the Attorney General said that because of *Everson* and *Bakalis* "[we] cannot say that L.B. 522 is unconstitutional."[27] This statement does not resolve the areas of constitutional uncertainty that have been expressed by opponents of the bill.[28] Further, since the opinion was given on March 3, and, therefore, dealt with L.B. 522 as originally introduced, the Attorney General did not consider the constitutionality of the bill as adopted by the legislature.

III. *EVERSON* AND ITS PROGENY

Proponents of L.B. 522 will rely on *Everson v. Board of Education*[29] and its holding that a state statute permitting public funds to be expended to furnish school bus transportation for nonpublic students was constitutional. In that case, a New Jersey

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v. Bakalis . . . . Consequently, we cannot say that L.B. 522 is unconstitutional.

NEB. ATT'Y GEN. OP. (March 3, 1975).

26. *Id.*
27. *Id.*
28. *See* sections III and IV *infra*. Relevant to the discussion in these sections is testimony presented to the Education Committee about L.B. 522 by Ross Rasmussen, representing the Nebraska State School Boards Association. He noted that in 1965 a constitutional amendment similar to the proposed legislation had been presented to the voters and was defeated, 253,945 votes to 191,986. He stated that "[i]n 1965 the proponents of this measure felt that to provide public tax monies for non-public schools our State Constitution would need to be changed." *Hearings on L.B. 522 Before the Educ. Comm., supra* note 18, Exhibit A, at 1-2. Therefore, it is arguable that to seek to accomplish the same result by legislation is not valid.

    Mr. Rasmussen presented four key issues that led to the defeat of the 1965 constitutional amendment and that would figure prominently in discussion about the 1975 legislation: potential local disagreements about bus routes; fear that individuals would seek election to a school board in order to establish bus routes; the extra cost of additional buses; providing bus transportation for nonpublic students outside of the public school district while denying it to nonresident public school students. Furthermore, since communication between public and nonpublic schools is through the State Department of Education, this is another area of entanglement. *Hearings on L.B. 522 Before the Educ. Comm., supra* note 18, Exhibit A, at 1-2.
29. 330 U.S. 1 (1947).

statute[30] authorized, but did not require, local school districts to make rules and contracts for the transportation of children to and from schools. Before passage of this bill, the state had no provisions for such assistance; therefore, the purpose of this legislation was to benefit *all* children. In fact, this did not occur since children attending proprietary schools were not to receive the benefits.[31] The statute and a resolution passed by a township board of education authorizing "reimbursement to parents of money expended by them for the bus transportation of their children on regular buses operated by the public transportation system"[32] were challenged as violating the due process clause of the fourteenth amendment and the establishment clause of the first amendment.

The first argument, that the state through taxation took the property of some and used it for the private purposes of others, was disposed of by the Court.

> [T]he New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children. . . . The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.[33]

The second allegation, that of unconstitutionality under the establishment clause, afforded the Court the opportunity to decide for the first time what was meant by establishment of religion in the context of the first amendment, and what limitations on state action were imposed by the clause.[34] The Court acknowledged that

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30. Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

    When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

    Id. at 3 n.1.

31. *See* notes 68-70 and accompanying text *infra*.

32. 330 U.S. at 3.

33. *Id.* at 6.

34. *Id.* at 29 (Rutledge, J., dissenting). The Court cited its previous decision of Reynolds v. United States, 98 U.S. 145 (1878) to show in general terms what was meant by the establishment clause.

    The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws

public funds could not be used to *support* a sectarian institution, but asserted that individuals could not be denied the right to receive the benefits of public welfare legislation because of their faith.[35] It was determined that the plan to pay bus fares of parochial school children was part of "*a general program* to help parents get their children . . . safely and expeditiously to and from accredited schools"[36] and that this free transportation system was "of a kind which *the state deems to be best for the school children's welfare.*"[37] This situation was analogized to state action in furnishing police and fire protection, sewage disposal, and public highways and sidewalks for church schools, all of which are constitutional exercises of the state's power to promulgate public welfare legislation.[38]

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which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief, or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

330 U.S. at 15-16.

35. [O]ther language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.

Id. at 16.

36. *Id.* at 18 (emphasis added).

37. *Id.* at 17 (emphasis added).

38. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. . . . Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. . . . Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious

The *Everson* decision is almost 30 years old and has the weight of precedent behind it. The rationale used by the Court in that instance has been used by state courts in holding similar statutes constitutional.[39] More importantly, however, the Supreme Court has relied on *Everson* in seeking to locate "the line between state neutrality to religion and state support of religion."[40] A notable example of this was *Board of Education v. Allen*,[41] in which the Court was called on to decide if a New York statute, requiring local public school officials to lend textbooks free of charge to *all* students in grades seven through twelve, violated the first amendment.[42] The statutory scheme was similar to that in *Everson* in several ways. Before passage of the New York statute, school boards rented or sold books to public school students, but did not loan them;[43] prior to passage of the New Jersey statute, no provision had been made to furnish transportation for children who lived far from school. Both statutes changed existing law and extended certain benefits to *all* children *at the same time.* In this way, there could be no allegation that the law was being passed to render assistance to one particular group of students.

Although there had been decisions intervening between *Everson* and *Allen* in the area of church-state relations,[44] the Court relied

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believers and non-believers; it does not require the state to be their adversary.

Id. at 17-18.

39. *See* note 4 *supra.*

40. Board of Educ. v. Allen, 392 U.S. 236, 242 (1968).

41. 392 U.S. 236 (1968).

42. [B]oards of education . . . shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education . . . . Such textbooks are to be loaned free to such children . . . .

Ch. 795, § 701, [1966] N.Y. Laws 1727 (now N.Y. EDUC. LAW § 701 (McKinney Supp. 1974)).

43. Until 1965, § 701 of the Education Law of the State of New York . . . authorized public school boards to designate textbooks for use in the public schools, to purchase such books with public funds, and to rent or sell the books to public school students. In 1965 the Legislature amended § 701, basing the amendments on findings that the "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state."

392 U.S. at 238-39 (footnote omitted).

44. In School District v. Schempp, 374 U.S. 203 (1963), the Court articulated a two-pronged test to help it determine what state involvements

on the *Everson* rationale and held the New York law constitutional because it "merely makes available to all children the benefits of *a general program*[45] to lend school books free of charge."[46] As in *Everson*, the assistance was being given to the parents and children, not the schools.[47]

Two of the three dissenting judges in *Allen*, Black and Douglas,

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with religion were permissible under the establishment clause.

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

374 U.S. at 222. The statute in *Everson* would have withstood the scrutiny of this test.

45. Justice Fortas, in his dissenting opinion, took issue with the Court's finding that the textbook loan act was a general program, providing the same benefits to all children and thereby not favoring one group of students over another.

> It is misleading to say, as the majority opinion does, that the New York "law merely makes available to all children the benefits of a general program to lend school books free of charge." . . . This is not a "general" program. It is a specific program to use state funds to buy books prescribed by sectarian schools . . . . It could be called a "general" program only if the school books made available to all children were precisely the same—the books selected for and used in the public schools. But this program is not one in which all children are treated alike, regardless of where they go to school. This program, in its unconstitutional features, is hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given *special* books—books selected by the sectarian authorities. How can this be other than the use of public money to aid those sectarian establishments?
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> . . . .
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> This case is not within the principle of Everson v. Board of Education . . . . Apart from the differences between textbooks and bus rides, *the present statute does not call for extending to children attending sectarian schools the same service or facility extended to children in public schools.* This statute calls for furnishing special, separate, and particular books, specially, separately, and particularly chosen by religious sects or their representatives for use in their sectarian schools. This is the infirmity, in my opinion.

392 U.S. at 270-71 (Fortas, J., dissenting) (emphasis added).

46. *Id.* at 243 (emphasis added).

47. 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).

had been part of the 5-4 majority in *Everson*. Their dissent was not indicative of any basic disagreement with their position in *Everson*, however. Black distinguished the situation in *Allen* because the funds were directly benefitting the school,[48] whereas in *Everson* the state funds were going to the children. Douglas, on the other hand, while not rousingly affirming his commitment to *Everson*,[49] based his opposition to the textbook loan act primarily on the fact that textbooks go to the heart of all education, and careful textbook selection would result in use of public funds to buy books supporting sectarian positions.[50]

Meek v. Pittenger[51] is the most recent Supreme Court decision dealing with the constitutionality of providing public financial assistance to nonpublic schools. Although it supported the rationale and results of *Everson* and *Allen*, there are inconsistencies between *those* cases and *Meek* which must be resolved before the latter decision can be relied on in future litigation.[52]

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48. [I]t is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service. With respect to the former, state financial support actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar; with respect to the latter, the State merely provides a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs.

Id. at 252-53 (Black, J., dissenting). The validity of this statement would be undercut in those situations where books were chosen by parochial school boards, not for their religious content, but because of the way in which the subject matter was presented.

49. "Whatever may be said of *Everson*, there is nothing ideological about a bus." *Id.* at 257 (Douglas, J., dissenting).

Douglas was to become more critical of his stance in *Everson* in his concurring opinion in Engel v. Vitale, 370 U.S. 421 (1962). There the Court held a directive by a New York board of education that a prayer be spoken aloud at the beginning of each school day was in violation of the first amendment.

> The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples.

370 U.S. at 443 (Douglas, J., concurring).

50. *See* note 45 *supra*. Douglas envisioned this careful selection of textbooks occurring mostly in the areas of history and evolution. Such selection would not result in public funds being used to support sectarian positions when the parochial school made its choice from one of several books under final consideration by the public school board.

51. 421 U.S. 349 (1975).

52. By the time *Meek* was decided, the Court had developed a three-pronged test which it used to determine if statutes permitting state

A divided Court in *Meek* held that a Pennsylvania statute permitting the loan of textbooks to children enrolled in nonpublic schools[53] was constitutional; however, a statute authorizing the Commonwealth to provide auxiliary services to these children and to loan instructional materials and equipment directly to the nonpublic schools was found to be unconstitutional.[54] In reaching the latter conclusion, the Court found that the primary purpose of the applicable section of the act was secular, but the *primary effect* was to "advanc[e] religion because of the predominantly religious character of the schools benefiting from the Act."[55]

In determining that the textbook loan act was constitutional, the Court likened the Pennsylvania statute to the New York law approved in *Allen*,[56] and once again acknowledged *Allen*'s dependence on *Everson*.[57] Because the textbooks were to be lent *directly* to students, "the financial benefit of Pennsylvania's textbook program, like New York's, is to parents and children, not to the nonpublic schools."[58] Although the statutes were similar, the Court noted that the Pennsylvania law provided that only books which had received prior approval by school officials could be lent to nonpublic students.[59] This provision answered the objections

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aid to nonpublic schools violate the establishment clause. The statute must have a secular legislative purpose, Epperson v. Arkansas, 393 U.S. 97 (1968); a primary effect that neither advances nor inhibits religion, School District v. Schempp, 374 U.S. 203 (1963); the statute and its administration must avoid excessive government entanglement with religion, Walz v. Tax Commission, 397 U.S. 664 (1970).

53. PA. STAT. ANN. tit. 24, § 9-973(c) (Cum. Supp. 1975-76). Passage of this statute only benefited parochial school students.

54. These latter two aspects of the Pennsylvania statute will not be discussed in this note. *But see* notes 86-93 and accompanying text *infra*.

55. 421 U.S. at 363.

56. Like the New York program, the textbook provisions of Act 195 extend to all schoolchildren the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school students. As in *Allen*, Act 195 provides that the textbooks are to be lent directly to the student, not to the nonpublic school itself, although, again as in *Allen*, the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials.

Id. at 360-61 (footnote omitted). The Court's contention that the New York and Pennsylvania statutes were similar can be challenged. *See* notes 61-62 and accompanying text *infra*.

57. *Id.* at 359-60.

58. *Id.* at 360.

59. Indeed, under the statutory scheme approved in *Allen*, the books lent to nonpublic school students might never in fact have been approved for use in any public school of the State.

expressed by Justice Fortas in *Allen*[60] that the statute involved there was not part of a *general* program affording the same opportunities to all, since the sectarian schools could pick out special books. The Court further stressed the constitutional necessity of making available to all children the benefits of the same general program by referring to its decision in *Public Funds for Public Schools v. Marburger*.[61] In that case a New Jersey textbook act was held unconstitutional because it would have reimbursed parents of nonpublic school children for money they spent to buy secular texts. Public school children, on the other hand, were lent their books.[62] Legislation which authorizes such special treatment will be adjudged unconstitutional, since its primary purpose will be to help nonpublic school children.

The *Meek* decision presents a special situation, because the statute challenged in that case was *not* the same as the one in *Allen*, and in general terms was not the same as that in *Everson*. Prior to *Everson*, no school children were provided with publicly funded school bus transportation.[63] In New York, before passage of the textbook loan act, *all* students had to rent or buy books.[64] Prior to passage of the Pennsylvania textbook law, however, the state was

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> The statute permitted the loan of books initially selected for use by the nonpublic schools themselves, subject only to subsequent approval by "any boards of education." . . . In contrast, only those books which have the antecedent approval of Pennsylvania school officials qualify for loan under Act 195.

Id. at 360 n.11.

60. *See* note 45 *supra*.
61. 417 U.S. 961 (1974).
62. > The New Jersey textbook provisions invalidated in *Public Funds for Public Schools v. Marburger* . . . unlike the New York textbook program involved in *Allen* and the Pennsylvania program now before us, were not designed to extend to all schoolchildren of the State, whether attending public or nonpublic schools, the benefits of State-loaned textbooks. Although New Jersey *public* schoolchildren were *lent* their textbooks, § 5 of the Nonpublic Elementary and Secondary Education Act, challenged in *Marburger*, provided that the State Commissioner of Education would reimburse the parents of *nonpublic* schoolchildren for money spent to *purchase* secular, nonideological textbooks. The District Court based its decision that the textbook provisions violated the constitutional prohibition against laws "respecting an establishment of religion" on the fact that the assistance provided—reimbursement for purchased textbooks—was not extended to parents of all students, but rather was directed exclusively to parents whose children were enrolled in nonpublic, primarily religious schools.

421 U.S. at 362 n.12.

63. *See* notes 30-31 and accompanying text *supra*.
64. *See* note 43 *supra*.

required to provide books free of charge for use in the Pennsylvania *public* schools. Thus, the new statute extended this benefit only to children in nonpublic schools; it was passed *specifically* to aid nonpublic school students and was *not* part of a general program. The *Meek* Court acknowledged this difference between the Pennsylvania and New York laws but did not see it as presenting any problems so long as the loan program was available to all school children, both in public and private schools.[65]

In many ways L.B. 522 is analogous to the Pennsylvania textbook loan statute. Just as Pennsylvania before enactment of the textbook act, loaned books to public school pupils, so too did the State of Nebraska furnish school bus transportation to children attending public schools prior to passage of L.B. 522.[66] By amending the existing Nebraska statute to permit the state to extend the same benefits to children attending nonprofit, nonpublic schools as are presently being received by public school children, L.B. 522 can be considered as legislation designed *primarily* to benefit children attending parochial schools; therefore, it is *not* part of a general welfare program, as was present in *Everson* and *Allen*, where before the statutes were passed no children received *any* benefits. Using the language in *Meek*, the primary purpose and primary effect of

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65. New York in a single statute authorized the loan of textbooks without charge to students attending both public and nonpublic schools. . . . The Pennsylvania General Assembly has used two separate provisions of the Public School Code of 1949 to accomplish the same result. Pa. Stat. Tit. 24, § 8-801, requires that textbooks be provided free of charge for use in the Pennsylvania public schools. Act 195, Pa. Stat. Tit. 24, § 9-972, provides the authorization for the loan of textbooks to nonpublic elementary and secondary school students. So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two.

421 U.S. at 360 n.8.

The Court in *Meek* cited to Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), where a New York tuition reimbursement plan for parents in low income brackets who sent their children to nonpublic schools was held unconstitutional. In *Nyquist*, the Court affirmed the constitutional importance of extending the same public benefits to *all* children.

Allen and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton v. Richardson* . . . in which federal aid was made available to *all* institutions of higher learning, and *Walz v. Tax Comm'n* . . . in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions.

413 U.S. at 782 n.38.

66. NEB. REV. STAT. § 79-487 (Reissue 1971).

L.B. 522 are to benefit the parochial schools. The bill's avowed secular purpose is to extend the benefits of publicly funded school bus transportation to students in private schools. Unlike the statute in *Meek*, however, L.B. 522 is *not* made available to all school children in public and private schools, but instead excludes those children in private schools which are operated for a profit. By so restricting the recipients of this publicly funded benefit, the primary effect of the legislation is to benefit parochial school children.

L.B. 522 also will not permit transportation to be provided to nonpublic school children who live on an existing bus route in a district that does not furnish bus transportation. By excluding *any* children from the benefits of school bus transportation, the argument that L.B. 522 and similar legislation are public welfare measures is seriously undercut. Provisions of this kind should apply to all citizens.[67] When legislation only benefits parochial school students, there is a violation of the establishment clause.

The *Everson* Court left a similar issue unresolved. Like L.B. 522, the New Jersey statute authorized the expenditure of state funds to transport only children who attended public schools or nonpublic schools *which were not run for a profit.*[68] The Court acknowledged the potential problems raised by this exclusionary language,[69] but did not feel compelled to resolve the issue since it had not been specifically raised.[70] The constitutionality of the statute in *Everson* rested on the fact that it was a public welfare measure,[71] yet denying the benefit of state-provided transporta-

67. *See* note 73 and accompanying text *infra.*
68. *See* note 30 *supra.*
69. 330 U.S. at 4-5.
70. Appellant does not challenge the New Jersey statute or the resolution on the ground that either violates the equal protection clause of the Fourteenth Amendment by excluding payment for the transportation of any pupil who attends a "private school run for profit." Although the township resolution authorized reimbursement only for parents of public and Catholic school pupils, appellant does not allege, nor is there anything in the record which would offer the slightest support to an allegation, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools. It will be appropriate to consider the exclusion of students of private schools operated for profit when and if it is proved to have occurred, is made the basis of a suit by one in a position to challenge it, and New Jersey's highest court has ruled adversely to the challenger.
Id. at 4 n.2.
71. Justice Jackson in his dissent pointed out the fallacy of justifying the New Jersey statute as a public welfare measure since it was not providing students with the safety afforded by transportation in a school bus.

tion to children who attend schools run for profit makes the legislation appear to have been adopted solely to aid parochial school children.[72] The same argument can be made in any litigation involving the constitutionality of L.B. 522. The plaintiff representing a child who attends a private proprietary school can challenge his/her exclusion from receiving the benefits of a general program designed to afford the safety of school bus transportation to all children,[73] since such exclusion undermines the position that the statute is a general welfare program. Instead, by benefiting only parochial school children, the primary effect of the legislation is to aid sectarian schools. Raising this issue presents potential violations of both the establishment clause and the fourteenth amendment.

Constitutional challenges to textbook and school bus statutes

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> The Township of Ewing is not furnishing transportation to the children in any form; it is not operating school buses itself or contracting for their operation; and it is not performing any public service of any kind with this taxpayer's money. All school children are left to ride as ordinary paying passengers on the regular buses operated by the public transportation system. What the Township does, and what the taxpayer complains of, is at stated intervals to reimbuse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public buses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before.

Id. at 19-20 (Jackson, J., dissenting).

72. The New Jersey Act in question makes the character of the school, not the needs of the children determine the eligibility of the parents to reimbursement. The Act permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit. Children often are sent to private schools because their parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective and need special attention. If all children of the state were objects of impartial solicitude, no reason is obvious for denying transportation reimbursement to students of this class, for these often are as needy and as worthy as those who go to public or parochial schools. *Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise.*

Id. at 20 (Jackson, J., dissenting) (emphasis added).

73. A similar problem had arisen in the *Bakalis* decision relied on by the Nebraska Attorney General as supporting L.B. 522's constitutionality. *See* notes 25-27 and accompanying text *supra*. In *Bakalis*, it was contended that the statute did not operate uniformly as to all nonpublic school students because of variation in location of public and nonpublic schools. However, lack of standing to challenge this aspect of the law left the issue unresolved. 54 Ill. 2d at 467, 299 N.E.2d at 746.

can also be based solely on alleged violations of the equal protection clause to the fourteenth amendment. Several cases have already been litigated. In *Luetkemeyer v. Kaufmann*,[74] the Court affirmed a lower court decision that there was no denial of equal protection when bus transportation was furnished to public school students but not to parochial school students. Since education was not a federally protected constitutional right,[75] the challenged statute was not to be subjected to the strict judicial scrutiny test. Rather, the proper standard to be applied in determining the constitutionality of the statute was whether the classification rested on grounds that were wholly irrelevant to the achievement of the state's objective.[76] The Court found a legitimate purpose for the classification, which excluded parochial school students from receiving bus transportation, in Missouri's "long history of maintaining a very high wall between church and state."[77]

Using the rationale of *Luetkemeyer*, a legitimate state purpose will justify exclusion of a certain class of children from receiving publicly funded transportation to school. Since L.B. 522 is allegedly a public welfare measure,[78] it will be difficult to rationalize how excluding proprietary school children from receiving the benefits of the statute would be relevant to achieving the state's objective of providing safe transportation. Additionally, the *Luetkemeyer* decision would answer a contention that finding L.B. 522 to be unconstitutional would deny parochial school children in Nebraska equal protection of the law by depriving them of publicly funded school bus transportation. Nebraska's long history of keeping a high wall between church and state would justify providing school bus transportation to public school children, while denying it to parochial school children.[79]

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74. 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).
75. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
76. 364 F. Supp. at 382.
77. *Id.* at 383. The statute in question also withstood the constitutional challenge that it denied the plaintiffs due process by forcing them to forego the right to the free exercise of their religion if they wished to receive the benefits of the public service of bus transportation.

> [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" . . . . That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States.

Id. at 386.
78. *See* note 18 *supra*.
79. *See* note 100 *infra*.

More useful than *Luetkemeyer* in resolving the equal protection issue raised by L.B. 522 would be the Supreme Court decision in *Norwood v. Harrison*,[80] where there was a challenge to the constitutionality of a statute which permitted textbooks, purchased with public funds, to be furnished to public and private school students without regard to whether any participating private school had racially discriminatory policies. The Court held that these state-conferred benefits could be denied to children attending certain private schools which engaged in such discriminatory practices.[81] The state would have a valid reason for refusing benefits to children whose parents sent them to private schools to avoid attendance at desegregated public schools. In the case of L.B. 522, however, there is no apparent invidious reason for sending a child to a proprietary private school; therefore, there is little justification for denying such a child state benefits which are conferred on all other children.

Other equal protection problems arise when the state receives federal funds which are to be used to provide services for school children. In *Wheeler v. Barrera*,[82] the Court dealt with the issue of whether public school authorities had to provide adequate Title I[83] programs for eligible private school children and held that "since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act."[84] However, Title I funds could not be used to provide services which would be proscribed by state law.[85] The Court held that the state had an obligation to furnish comparable services to private school children, as were provided to public school children, when it received federal funds. If any federal funds are used to bus Nebraska school children, then arguably parochial school children cannot be excluded from receiving these benefits; however, this position is undermined by deferring to the Nebraska Constitution which has been interpreted as proscribing such an expenditure. It can also be postulated that the provision of L.B. 522 which excludes proprietary school children

80. 413 U.S. 455 (1973).
81. In the future when schools would apply for textbooks for their pupils, they would have to declare affirmatively their admission policies and practices and state the number of their racially and religiously identifiable minority students. *Id.* at 471.
82. 417 U.S. 402 (1973).
83. "Title I of the Elementary and Secondary Education Act of 1965 . . . provides for federal funding of special programs for educationally deprived children in both public and private schools." *Id.* at 405.
84. *Id.* at 406 (footnote omitted).
85. *Id.* at 417-19. *See also* Section IV *infra*.

from receiving the benefits of publicly funded school bus transportation while affording the benefits to all other school children denies the former group equal protection of the law and would have to be invalidated before federal funds could be received.

Public funding for parochial schools raises the issue of violation of the first or fourteenth amendments. *Meek* has somewhat clouded the area and presents new questions that must be resolved in subsequent litigation. In justifying its holding that the direct loan of instructional material and equipment to nonpublic schools was unconstitutional, the Court stated that the aid contemplated would be massive and the benefit to church-related schools would be "neither indirect nor incidental."[86] Although the fact that the aid went *directly* to the schools was probably determinative of its unconstitutionality, emphasis was placed on the dollar amount of the proposed aid. Textbooks required an appropriation of $4,670,000,[87] while the loan of instructional material and equipment to nonpublic schools which was held to be unconstitutional would have cost just under $12,000,000.[88] The Court's reference to these figures makes it unclear whether there was a correlation between the amount of aid and the statute's constitutionality. It appears, however, that the primary reason for mentioning these figures was to illustrate the problems resulting from massive public aid to parochial schools.[89] In response to these difficulties, the Court acknowledged that there was a fourth test to be applied in judging whether a statute authorizing state aid to a church-related institution conflicted with the establishment clause, *i.e.*, the divisive political potential test.[90] This test was alluded to by Justice Douglas in *Allen*,[91] but was specifically articulated and relied on in *Lemon v. Kurtzman*.[92] The dissenting Justices in *Meek* pointed out that

86. 421 U.S. at 365.
87. *Id.* at 365 n.15.
88. *Id.* at 365.
89. The potentially divisive political effect of aid programs like Act 195, which are dependent on continuing annual appropriations and which generate increasing demands as costs and population grow, was emphasized by this Court in *Lemon v. Kurtzman* . . . and *Committee for Public Education & Religious Liberty v. Nyquist* . . . "[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored."
Id. at 365 n.15.
90. Some will argue that this is not a new test, but one aspect of the already accepted entanglement test.
91. 392 U.S. at 265 (Douglas, J., dissenting).
92. "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." . . .

> in light of the massive appropriations involved, the Court would be hard put to explain how the factor [of divisive political potential] weighs determinatively against the validity of the instructional materials loan provisions, and not also against the validity of the textbook loan provisions.[93]

Arguably, any litigation challenging the constitutionality of any of L.B. 522's provisions would have to consider whether some of the provisions have a divisive political potential.[94] In support of an allegation of such divisiveness, a number of hypotheses can be made. Supporters of nonpublic schools might be motivated to seek election to school board positions so that they would have a voice in planning school bus routes; therefore, this could elevate questions regarding routing to issues in a campaign for school board. Routing would present other problems since nonpublic school children will only be picked up if they live near an existing bus route. However, this does not preclude their being driven to an existing route by their parents. Since bussing is provided for school-related activ-

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> "In a community where . . . a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
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> "Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, *but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect* . . . . The potential divisiveness of such conflict is a threat to the normal political process. . . . It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. . . .
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> ". . . *Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.*
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> "*The potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow . . . .*" (Emphasis added).
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> 421 U.S. at 375, *quoting* 403 U.S. 602, 622-23 (1971) (Brennan, J., dissenting).

93. *Id.* at 377-78.

94. *See* note 28 *supra*.

ities,[95] with the increased number of children who are eligible to receive bus transportation, each district could be forced to decide on a cost-benefit basis whether they would provide bus transportation to a school-related activity for *any* children. Finally, an unknown number of new school buses will have to be purchased; their cost, plus the cost of paying drivers, purchasing fuel, and maintaining the buses will amount to a large annual appropriation of the kind contemplated by the dissent in *Meek*.[96] All these probable situations point up the potential divisive political effect of portions of L.B. 522.

IV. NEBRASKA DECISIONS

Not only can a challenge to the constitutionality of L.B. 522 be based on alleged violations of the establishment and equal protection clauses of the Federal Constitution, but the question of constitutionality may also be posed in reference to Article VII, section 11 of the Nebraska Constitution.[97] In *Gaffney v. State*

95. *See* note 8 *supra*.

96. *See* note 10 *supra*. Any massive appropriation of public funds, such as would be necessary to furnish bus transportation to children attending nonprofit, nonpublic schools, would create a divisive political potential.

> A divisive political potential exists because aid programs like Act 195, are dependent on continuing annual appropriations, and Act 195's textbook loan program, even if we accepted it as a form of loans to students, involves increasingly massive sums now approaching $5,000,000 annually.

421 U.S. at 381-82 (Brennan, J., dissenting) (footnote omitted).

97. > Neither the State Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof.

NEB. CONST. art. VII, § 11 (1920).

This was the relevant portion of Article VII, § 11 in effect at the time L.B. 659, the textbook loan act, was passed. Before Gaffney v. State Dept. of Ed., 192 Neb. 358, 220 N.W.2d 550 (1974) was litigated to determine the constitutionality of the act, this section of the constitution was amended, as were the provisions of L.B. 659. For a more complete discussion of the changes in the constitutional amendment and their implications, see notes 128-30 and accompanying text *infra*.

L.B. 659, amending NEB. REV. STAT. §§ 79-4,118, 79-4,118.01, 79-4,119 and 79-1338, was passed in 1971. It would have permitted textbooks to be loaned to private school students in grades seven to twelve. In 1972, the new provisions of Article VII, § 11 were approved by the voters. *See* note 7 *supra*. In 1973, L.B. 358 further amended § 79-4,118. It would have extended the benefits of L.B. 659 to children enrolled in grades kindergarten through twelve.

> Boards of education shall have the power and duty to purchase and to loan textbooks to all children who are enrolled in kindergarten to grade twelve of a public school and, upon individual request, to children who are enrolled in kinder-

Department of Education,[98] the Nebraska Supreme Court spoke definitively on what kinds of public aid were permissible under the Nebraska Constitution. That case passed on the constitutionality of the Nebraska Textbook Loan Act,[99] which permitted boards of education to purchase and loan textbooks to children attending private accredited schools. The court was called on to determine the Act's constitutionality under the Federal and Nebraska Constitutions. It dealt with the state constitutional issue first, and for purposes of interpretation relied on the proceedings of the Constitutional Convention of 1919-1920 to shed light on the meaning its

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garten to grade twelve of a private school which is approved for continued legal operation under rules and regulations established by the State Board of Education . . . . Textbooks loaned to children enrolled in kindergarten to grade twelve of such private schools shall be textbooks which are designated for use in the public schools of the school district. Such textbooks are to be loaned free to such children . . . .

NEB. REV. STAT. § 79-4,118 (Cum. Supp. 1974).

The situation precipitating the litigation in *Gaffney* occurred in 1971; therefore, the *Gaffney* decision dealt with L.B. 659 and was necessarily decided on the basis of the constitutional provision in effect at that time. It is arguable, however, that the issue was moot and the court in *Gaffney* should have refrained from making a decision. NEB. CONST. art. III, § 14 provides that "no law shall be amended unless the new act contains the section or sections as amended and the section or sections so amended shall be repealed." Therefore, when L.B. 358 was passed, NEB. REV. STAT. § 79-4,118 was repealed, and then reenacted. If L.B. 659 was effectively eliminated, then the *Gaffney* court had nothing to decide since the 1971 act had to be measured against a constitutional provision that was no longer in effect in the same form, and L.B. 358, the statute in force, had not been constitutionally challenged. The validity of this observation is not affected by NEB. REV. STAT. § 49-301 (Reissue 1974) which provides: "whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." There was no pending action based on L.B. 659 which remained after its repeal.

98. 192 Neb. 358, 220 N.W.2d 550 (1974). *Gaffney* was a 5-2 decision, the minimum number of votes necessary for the Nebraska Supreme Court to find a statute unconstitutional. NEB. CONST. art. V, § 2.

99. Boards of education shall have the power and duty to purchase and to loan textbooks to all children who are enrolled in grades kindergarten to twelve of a public school and, upon individual request, to children who are enrolled in grades seven to twelve of a private school which is approved for continued legal operation under rules and regulations established by the State Board of Education . . . . Textbooks loaned to children enrolled in grades seven to twelve of such private schools shall be textbooks which are designated for use in the public schools of the school district. Such textbooks are to be loaned free to such children . . . .

NEB. REV. STAT. § 79-4,118 (Reissue 1971).

framers attached to Article VII, section 11.[100] The result was a literal interpretation of the Nebraska Constitution[101]—the state could "[*n*]*ever* make *any appropriation* from any public fund . . . *in aid of any sectarian* . . . school . . . which is not exclusively owned and controlled by the state . . ."[102] Since the textbook loan act would have allowed public money to be used to furnish textbooks, a form of aid, to sectarian schools, the court held that this act was clearly unconstitutional. By considering this constitutional language to be definitive and unambiguous, the *Gaffney* court foreclosed any discussion of constitutionality under the establishment clause, with its three-pronged test as fashioned by the United States Supreme Court.[103]

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100. In the proceedings of the 1919-1920 Constitutional Convention, the following are pertinent excerpts from the Convention proceedings: "As far as I am personally concerned, I desire to have the Constitution prohibit any state aid under any guise tc any educational institution other than the public school. It is not a difficult matter, if the Legislature sees fit to find an excuse in the interests of general welfare, to make donations under the guise of military training or normal training or what not, in a private institution. I have absolutely no hostility to those institutions, but it will invariably bring on the kind of *war fare* that this state should stay clear from, if you mingle the *state* and *church* even to that extent. . . .

". . . The state might desire to adopt the policy, instead of extending its own plan for normal schools, to utilize the denominational schools. . . .

"I am opposed to that principle. . . .

"Mr. Taylor: This amendment simply does this: It prohibits the *aiding by the state of any schools other than those owned and controlled by the state or its subdivisions.* It makes that matter plain and the amendment ought to be adopted." (Emphasis supplied.) . . . .

We come to the conclusion that by its terms, by its history, and by its purpose, that the intent of the amendment was, and is, to prohibit the extension of aid from public funds to nonpublic schools, in any manner, shape, or form.

192 Neb. at 363, 220 N.W.2d at 553-54.

101. It seems to us that to state the constitutional provision is to answer our question. By its terms the provisions furnish aid (in the form of textbooks) to private sectarian schools. By its terms the cost is paid by a public appropriation of tax funds. By its terms textbooks must be used and are given in aid of students in educational institutions which are not exclusively owned and controlled by the state or a governmental subdivision thereof.

Id. at 361-62, 220 N.W.2d at 553.

102. NEB. CONST. art. VII, § 11 (1920). *See also* note 97 *supra.*

103. The question, if we can call it that, here presented, is fundamentally different than the one presented by state action involving an examination of the standards set up by the United States Supreme Court under the Establishment Clause of the First Amendment. It is true the question under the Constitution of Nebraska and the Constitution of the United States both relate to the overall principle of separation of church and

With its decision, the court stripped away the fiction known as the child-benefit theory, and acknowledged that the parochial school, not the child, was the beneficiary of public aid appropriations, such as textbook loan acts and legislation authorizing school bus transportation.[104] To reach this position the court looked to the substance not the form of such legislation. As justification for its position, the court cited to another recent state court decision, *Epeldi v. Engelking*.[105] There the Idaho court had determined that a provision permitting the state to bus pupils to parochial schools was unconstitutional under the Idaho Constitution.[106] It interpreted a provision of the

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state. But, by its terms, the Constitution of Nebraska does not permit of an examination of secular or sectarian purposes, a determination of primary or incidental benefit, or a balancing of the issues involved in state-church entanglement and political divisiveness. There is no ambiguity in our constitutional provision. The impact of the language and its purpose can be understood by any literate person. The standards are not secular purpose, primary aid, or political divisiveness and state-church entanglement. They are whether there is a public appropriation, whether the grant is in aid of any sectarian or denominational school or college, and, perhaps more importantly, the meaning of these two terms, if they would require any further definition, is fastened down unequivocally, fundamentally, and permanently by the statement that any educational institution which receives such aid must be exclusively owned and controlled by the state or a governmental subdivision thereof.

192 Neb. at 362, 220 N.W.2d at 553. Even if the statute had been subjected to the three-pronged test, there would have been problems in adjudging it to be constitutional. Although similar to the statute in *Allen*, L.B. 659 was not the same. Prior to its passage, Nebraska had lent textbooks to public school children. Therefore, L.B. 659 was legislation passed specifically to benefit children attending parochial schools and was *not* part of a general program to extend certain benefits to all at the same time and in the same way.

104. *See* note 11 *supra*. In terms of constitutional questions, the two kinds of legislation are similar. Illustrative of this is the *Gaffney* court's citation of other state court decisions which had dealt with similar or identical constitutional provisions and reached the same conclusion the Nebraska court did. 192 Neb. at 364-65, 220 N.W.2d at 554-55. These decisions involved textbook loan acts *and* a provision for bussing parochial school children. *See* Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971).

105. 94 Idaho 390, 488 P.2d 860 (1971).

106. Sectarian appropriations prohibited.—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 . . . controlled by any church, sectarian or religious denomination whatsoever . . . .

IDAHO CONST. art. IX, § 5.

Idaho Constitution, similar to Article VII, section 11 of the Nebraska Constitution, as requiring the court to focus on whether the legislation was in aid of any church and whether it helped support any church-affiliated school. Constitutional requirements were not met simply because the act benefited the student.[107] The *Gaffney* court followed *Epeldi* and emphasized that it "must examine the character of the aided activity rather than the manner or the form in which aid is given."[108] This pronouncement undermined the vitality of the child-benefit theory in Nebraska.[109] Yet, it remains for another decision to apply this rationale to school bus transportation legislation.[110]

Gaffney had affirmed the position the Nebraska Supreme Court had taken in *State ex rel. Rogers v. Swanson*,[111] a case decided a few weeks before *Gaffney*, which exhaustively considered the

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107. The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute, *both the 'child benefit' theory discussed in Everson v. Board* . . . and the standard of *Board of Education v. Allen* . . . i.e. whether the legislation has a 'secular legislative purpose and a primary effect that neither advances nor inhibits religion.' In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, *it also aids those schools by bringing to them those very students for whom the parochial schools were established.* Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. art. 9, § 5.

94 Idaho at 395-96, 488 P.2d at 865-66 (emphasis added).

108. 192 Neb. at 369, 220 N.W.2d at 557.

109. It is clear to us the fact that the benefit of the secular textbooks goes originally to the student rather than directly to the school is a mere conduit and does not have the cleansing effect of removing the identity of the ultimate benefit to the school as being public funds. And interwoven with this situation, realism demands that we see that free textbook loans may be, and it is reasonably probable that they are, the circumstance which determines whether a given pupil will remain in a parochial school or in a public school. The granting of free textoook loans to a parochial school student lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution.

Id. at 370, 220 N.W.2d at 557. *See also* note 11 *supra.*

110. As has been pointed out, buses are different than textbooks. *See* note 48 *supra.*

111. 192 Neb. 125, 219 N.W.2d 726 (1974). Dr. Vance Rogers had sought reimbursement for an expense which he had incurred under L.B. 1171, which provided for: "A system of financial assistance to qualified residents of college age . . . [to] enable them to attend qualified independent institutions of higher learning of their choice in this state." The state treasurer refused to countersign a warrant issued upon the treasury of the State of Nebraska; the legality of his action depended upon the constitutionality of the statute.

same issue of whether a public appropriation of aid would be given to the private school students or to the private school itself. The court stressed that "the Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly."[112] In *Rogers*, the court considered for the first time[113] whether a statute authorizing public aid to nonpublic schools was constitutional as measured against the Federal Constitution *and* Article VII, section 11 of the Nebraska Constitution. Unlike *Gaffney*, where the court's finding that the statute was unconstitutional under Article VII, section 11 made inquiry as to its constitutionality under the establishment clause unnecessary, the court in *Rogers* considered the constitutionality of L.B. 1171 under both the state and federal constitutions. In discussing the federal constitutional question, the court relied on recent Supreme Court decisions[114] stating that laws permitting public appropriations for tuition subsidies, which would be paid to parents of children attending nonpublic schools, were not cleansed of their unconstitutional effect because the payments were to the parents and not to the schools.[115]

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112. *Id.* at 129, 219 N.W.2d at 730, *citing* United Community Serv. v. Omaha Nat'l Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).
113. *Id.* at 140-41, 219 N.W.2d at 736 (Clinton and McCown, JJ., dissenting).
114. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973). The court in *Rogers* said:

> Although these cases dealt with questions arising under the First Amendment to the Constitution of the United States, they specifically hold that tuition allowances from public funds to parents of students are, in effect, appropriations for, or in aid of, private schools, and as such are impermissible. Direct allowance of such tuition funds to the students as distinguished from their parents is immaterial. The same factors are present. It is a patent attempt to sanction by indirection that which the Constitution forbids.

192 Neb. at 136, 219 N.W.2d at 733.

A prime concern in the passage of L.B. 1171 was to ensure the continued solvency and operation of private colleges. This is evident from the legislative debate quoted by the court. 192 Neb. at 130-31, 219 N.W.2d at 730-31. In addition, a portion of the act confirms this intent to aid the private schools.

> (2) The increased costs of operating our independent colleges and universities have forced tuition increases which make freedom of choice in education difficult for many of the students of this state;
>
> . . . .
>
> (4) A system of financial assistance to qualified residents of college age will enable them to attend qualified independent institutions of higher learning of their choice in this state.

192 Neb. at 129, 219 N.W.2d at 730. The proposed aid was a two-way proposition. Just as it would aid students to go to private institutions, so too would it lessen the financial burden on these schools.

115. In *Nyquist*, the Court had found a New York law granting tuition re-

Neither *Gaffney* nor *Rogers* referred to an earlier Nebraska decision, *State ex rel. School District of Hartington v. Nebraska State Board of Education*,[116] where the court specifically affirmed its belief in the child-benefit theory[117] and approved leasing of space in a parochial school by a public school district.[118] In that case, although the question of the leasing arrangement's constitutionality was challenged on the basis of the establishment clause

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imbursement and tax benefits to parents of elementary and secondary private school students to be unconstitutional.

> As Mr. Justice Black put it quite simply in *Everson*: "No tax in any amount large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion."
>
> The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. . . . Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of over-burdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.

413 U.S. at 780-83.

116. 188 Neb. 1, 195 N.W.2d 161 (1972), *cert. denied*, 409 U.S. 921 (1972). Because of lack of space, a school district had entered into an arrangement with Hartington Cedar Catholic High School to lease classrooms so the public school district could provide remedial reading and mathematics instruction to meet the special educational needs of educationally deprived children. Litigation arose when the school district sought to compel the Nebraska State Board of Education and the Department of Education to approve its application for a grant of federal funds pursuant to the Federal Elementary and Secondary Education Act of 1965. 20 U.S.C. § 241(e).

117. It would seem that an attempt to prohibit a student enrolled in a parochial school from participating in a program conducted by the public schools, solely because the student was enrolled in a parochial school, would violate this provision of the Constitution of Nebraska [that states no religious test or qualification shall be required of any student for admission to any public school].
>
> The United States Supreme Court has, in the past, recognized a distinction between aid provided to parochial school students or their parents and aid provided to the school itself.

188 Neb. at 4, 195 N.W.2d at 164.

118. "If the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian, there is no constitutional violation. The lease in this case meets these requirements." *Id.* at 3, 195 N.W.2d at 163.

and Article VII, section 11 of the Nebraska Constitution, the only portion of section 11 discussed was the one providing that no religious test can be required of a student for admission to public school.[119]

The subsequent Nebraska decisions have seemingly overruled *Hartington* by implication. The continued vitality of *Hartington*'s statement that parochial school children would be denied equal protection of the law were they not given the same benefits available to those attending public school, solely because of their attendance in nonpublic institutions, is also questionable.[120] In litigation over the constitutionality of L.B. 522 this argument could be made; however, the fact that L.B. 522 would provide school bus transportation to children attending nonprofit, nonpublic schools but would exclude children attending proprietary schools, children not living on the regular bus routes (unless their parents drove them to a pick-up point) and children living in school districts that do not provide bus transportation, leaves L.B. 522 itself open to a challenge that it does not afford equal protection of the law to all school children.[121]

Gaffney and *Rogers* are the setting in which L.B. 522 will be challenged under Article VII, section 11. They form a seemingly insurmountable barrier for proponents of L.B. 522 to overcome. As has been shown,[122] public appropriations for buses and textbooks for private school pupils present similar issues. The court's reasoning in *Gaffney*, that loaning textbooks is unconstitutional, can be easily adapted to litigation involving L.B. 522, with the result that school bussing will also be adjudged unconstitutional. Although the Attorney General[123] opined that there probably would be no violation of Article VII, section 11, because L.B. 522 has the secular purpose of protecting the health and safety of children travelling to school, *Gaffney*'s thrust is clearly to the contrary. Support for the Attorney General's opinion was found in *Bakalis*.[124] Yet,

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119. *See* note 117 *supra*.

120. The record shows that the classes which would be conducted by the Hartington School District in the leased classrooms would include both students enrolled in the public schools and students enrolled in nonpublic schools. *It would seem that to deny a student the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school would violate that student's right to free exercise of religion and to equal protection of the law.*
188 Neb. at 5, 195 N.W.2d at 164 (emphasis added).

121. *See* notes 68-81 and accompanying text *supra*.

122. *See* note 104 *supra*.

123. *See* note 25 *supra*.

124. 54 Ill. 2d 448, 299 N.E.2d 737 (1973).

reliance on *Bakalis* can produce uncertain results. Although the Illinois bill held constitutional in *Bakalis* is similar to L.B. 522,[125] and although the Illinois court, like the *Gaffney* court, used constitutional convention proceedings to aid in interpreting the words of their state constitutions, the result in *Bakalis* is different only because the court found that the applicable section of the Illinois Constitution[126] had not been intended to be more restrictive than the first amendment of the Federal Constitution.[127] Had the court

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125. The school board of any school district that provides any school bus or conveyance for transporting pupils to and from the public schools shall afford transportation, without cost, for children who attend any school other than a public school, who reside at least 1½ miles from the school attended, and who reside on or along the highway constituting the regular route of such public school bus or conveyance, such transportation to extend from the homes of such children or from some point on the regular route nearest or most easily accessible to their homes to and from the school attended, or to or from a point on such regular route which is nearest or most easily accessible to the school attended by such children.

ILL. REV. STAT. ch. 122, § 29-4 (1971). *See* notes 23-27 and accompanying text *supra*. The statutory provisions do differ somewhat from those of L.B. 522. The Illinois bill extends its benefits to children attending public schools and "any school other than a public school," whereas L.B. 522 limits its benefits to children attending public and nonprofit, private schools. Also, the Illinois bill does not limit the state to furnishing transportation to private school children who live in a district that provides transportation to public school children as L.B. 522 does.

126. Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; 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 purpose.

ILL. CONST. art. X, § 3 (1970).

The factual situation of *Bakalis* differs from that of *Gaffney* in that the Illinois bussing statute was enacted in 1933 and the constitution was amended in 1970.

127. The Committee is of the opinion that the Illinois Supreme Court in the cases . . . has interpreted the words "aid", "support or sustain", and "sectarian purpose" to yield the same results as the United States Supreme Court's interpretation of the word "establish" in the Federal First Amendment. In addition, since the testimony of legal authorities . . . has indicated that the present language is no more restrictive than the Federal language but rather yields the same substantive results, the Committee has concluded that any program which is constitutional under the Federal "establishment" clause is constitutional under the present wording of ARTICLE VIII, Section 3.

. . .

The Committee thus decided to follow the recommendation

found an intention that this provision be read very restrictively, as the court did in *Gaffney*, then the results of *Gaffney* and *Bakalis* would probably have been in harmony.

It is possible to challenge the continuing validity of the *Gaffney* decision because Article VII, section 11 of the Nebraska Constitution has been amended since *Gaffney* gave it a restrictive interpretation.[128] One of the most relevant changes adopted in the 1972 amendment was the substitution of the word "to" for "in aid of" in the clause prohibiting appropriations to any sectarian school.[129] By reading this new section literally, it is possible to find L.B. 522 to be constitutional, since the money would *not* be going directly *to* the schools, but instead would be benefiting the school children. The words "in aid of" found in the previous constitutional provision served as a more all-encompassing restriction, since even indirect assistance *to* the children would in some way "aid" the nonpublic school. However, despite the new wording of the constitution, the effect is no different and a court called on to decide the constitutionality of L.B. 522, measured against the new Article VII, section 11, would reach the same conclusion as the *Gaffney* court. The intent of the framers of the amendment would be examined, as in *Gaffney*, and it would be shown that the amendment was not meant to alter this part of section 11. Rather, it was changed only to permit the state to receive federal funding.[130]

> of the overwhelming majority of the witnesses which was to retain Section 3 without change. The depth of emotion underlying much of the testimony has further convinced the Committee that any change, even one that is not substantive, would be unwise.

54 Ill. 2d at 463-64, 299 N.E.2d at 744-45.

128. *See* note 7 *supra*.

129. *Id.*

130. > It is my understanding that this testimony was requested following the action of the sub-committee on Education, after reviewing Article VII, Section 11, which deals with sectarian instruction and prohibits any appropriations to schools which are not government owned and controlled. *Although the subcommittee recommended no change to this clause,* I am grateful and pleased to have this opportunity to express a different point of view. I will try to present this issue which has become an emotionally charged polemic as objectively as possible.

NEBRASKA CONSTITUTIONAL REVISION COMMISSION 457-58 (1970) (testimony of Paul O'Hara) (emphasis added).

Mr. O'Hara, the lobbyist for the Nebraska Catholic Conference, acknowledged that he believed there was no change to the clause prohibiting appropriations to nonpublic schools.

> The present Section 11 deals with two things. It deals with the conflict between church and state and state and non-church educational institutions. *Because we thought we could*

V. CONCLUSION

L.B. 522 will permit the State of Nebraska to use public funds to bus children to parochial schools. It is anticipated that there will be litigation to determine the question of this statute's constitutionality under the Nebraska and Federal Constitutions.

The federal constitutional challenge can be based on alleged violations of the establishment clause and the fourteenth amendment. For a court to determine that L.B. 522 violates the establishment clause it would have to accept the applicability of the "political divisive potential" test in this situation. It would also have to agree that this legislation was passed solely to benefit parochial school children. A challenge based on violation of the equal protection clause would focus on the fact that children attending private proprietary schools are excluded from receiving the benefits of the statute. Despite the outcome of the federal constitutional question, it is probable that after consideration of the Nebraska Supreme Court's decisions in *Gaffney* and *Rogers*, in which the constitution was strictly interpreted as prohibiting any state appropriations that would aid nonpublic schools, L.B. 522 will be held to violate Article VII, section 11 of the Nebraska Constitution.

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> *do a better job, we did redraft the language. There was no intention in our redraft to change any of the ideas we thought were trying to be expressed in Section 11 as it now stands* with one exception. We have added the specific permission of the state or local subdivision.

Id. at 279 (remarks of David Dow) (emphasis added). L.B. 656 was the bill providing for the amendment of Article VII, § 11. Discussion about this bill in the legislature confirms that the only purpose behind the change in the constitution was to permit the state to receive federal funds.

> It's the bill that will allow federal funds to come into the State general fund and to be designated as the Federal Government seed [sic] according to their rules and regulations. At the present time we have trouble with the Nebraska Constitution and this appeared before the Constitution Revision Commission last year . . . .

UNICAMERAL TRANSCRIPTS, 84th Leg., 1st Sess. 3045 (Jan. 10, 1972) (remarks of Sen. Barnett). For a contrary interpretation of the amended section see Comment, *Public Aid to Nonpublic Institutions in Nebraska*, 9 CREIGHTON L. REV. 18, 28-31 (1975).