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AGAINST A WALL OF STRICT SEPARATION: MISSOURI'S CHURCH-STATE DOCTRINE AND STATE PROVISION OF SPECIAL EDUCATION SERVICES TO PRIVATE SCHOOLS

When a state legislature passes and the governor signs into law a bill which allows or mandates some type of contact between public and private schools, the first question most attorneys ask is whether the program violates the establishment clause of the first amendment of the United States Constitution. In Missouri, however, this should be the second question. The first issue that should concern an attorney who considers such a statute passed in Missouri is whether the statute violates any of the "religion clauses"¹ of the Mis-

1. For the purposes of this Note, the provisions of the Missouri Constitution which placed restrictions on the state as to its contact with religion will be called the "religion clauses" of the constitution. They are:

MO. CONST. art. I, § 6:

That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

MO. CONST. art. I, § 7:

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

MO. CONST. art. III, § 38(a):

The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States.

MO. CONST. art. IX, § 8:

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of

souri Constitution. Those clauses place a more restrictive barrier between church and state than does the federal Constitution,² and thus an enactment by the state legislature wishing to pass constitutional scrutiny must meet the more restrictive guidelines set by the state constitution before federal constitutional questions are considered.

The 84th Missouri General Assembly, in its first regular session enacted and the governor signed into law a bill which mandates the type of contact between public and private, home, or parochial schools which raises church-state separation issues. The "Special Needs Adoption Tax Credit Act" (hereinafter "Act") was amended by a committee of the Missouri House of Representatives³ to contain sections which provide:

1. Children who regularly attend private, parochial, parish or home schools but who attend "special educational services" in public school districts will be considered in compliance with the state's mandatory attendance law.⁴

learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

2. *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (en banc), *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (en banc). For example, the federal constitutional case of *Everson v. Board of Educ.*, 330 U.S. 61 (1947), allows public school boards to provide for the transportation of parochial school children, while the Missouri case of *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953) (en banc), does not. Also, the federal case of *Board of Educ. v. Allen*, 392 U.S. 236 (1968), allows the lending of textbooks by public school districts to parochial school children, while the Missouri holding in *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (en banc), finds such loans impermissible. See *Luetkemeyer v. Kaufman*, 364 F. Supp. 376 (W.D. Mo.), *aff'd*, 419 U.S. 888 (1973) (Missouri's church-state separation policy does not infringe upon any rights protected by the United States Constitution); *Brusca v. Board of Educ.*, 332 F. Supp. 275 (E.D. Mo. 1973), *aff'd*, 405 U.S. 1050 (1972); see also *McDonough v. Aylward*, 500 S.W.2d 721 (Mo. 1973) (Missouri's strict policy on church-state separation does not impermissibly infringe the right of free exercise of religion under the first amendment nor the equal protection clause of the fourteenth amendment of the United States Constitution). *Contra Note, Public Aid To Parochial Education in Missouri*, 1976 WASH. U.L.Q. 279 (1976) (the "absolute separation of church and state" decreed in *Harfst v. Hoegen*, 349 Mo. 808, 817, 163 S.W.2d 609, 614 (1942) (en banc) which established Missouri's strict policy, was broader than necessary to resolve the issue presented by the case and should be considered *dicta* rather than controlling law).

3. The provisions of the Act with which this Note is concerned were originally introduced in the first regular session of the 84th General Assembly as Senate Bill 365. That bill died awaiting action by the full Senate. The provisions, however, were added to Senate Bill 402 by a House Committee. That bill passed the House on June 12, 1987, and the Senate adopted the House version of the bill on June 14, 1987. Governor Ashcroft signed the bill into law on August 11, 1987.

4. This provision ensures that participating students will be considered in compliance with the state's mandatory attendance law. In the 1966 case of *Special Dist. for the Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (Mo. 1966) (en banc), a statutory program similar to the one established by the Act was struck down on the grounds that the program violated the state's mandatory attendance laws. The law provided that students between certain ages must attend "some day

2. A public school district which provides special educational services to such

school." MO. REV. STAT. § 164.010 (1959) (now MO. REV. STAT. § 167.031 (1986)). The program in *Wheeler* allowed parochial school students to attend speech therapy classes at a public school building during part of their six-hour school day. In *Wheeler*, the court held the state's compulsory attendance law to mean that a student may attend only one school for the six-hour school day and may not split his school day between two schools. 408 S.W.2d at 63-64.

The Act currently is being challenged in the Circuit Court of Cole County. *Moore v. Bartman*, Case No. CV 187-1102CC (Cole County Circuit Court Sept. 8, 1987); see *infra* note 6. Duane Benton, Attorney for the plaintiff in that suit, argues that the Missouri Supreme Court in *Wheeler* did more than just apply the state's mandatory attendance statute. He asserts that the court, while deliberately not reaching the Missouri constitutional issue involved in the case, decreed that this sort of "shared time" scheme (in which parochial school children are allowed to receive educational services at public schools during the school day) will not be allowed in Missouri. Benton believes that such a policy statement in *Wheeler* would have been consistent with the court's other holdings calling for an absolute separation of church and state. Telephone interview on Nov. 25, 1987, with Duane Benton, Attorney for the plaintiff in *Moore v. Bartman*, Case No. CV 187-1120CC (Cole County Circuit Court Sept. 8, 1987); see *infra* note 6.

In 1971, the Attorney General of Missouri took a contrary position on the "shared time" issue. Op. Mo. Att'y Gen. 71-133 (Oct. 28, 1971). In that opinion, the Attorney General considered whether students who were not in the age group covered by the compulsory attendance law could be excluded from attending vocational education classes because they were enrolled in religious schools. *Id.* at 2. In concluding that the students could not be excluded, the Attorney General relied on several arguments that, because of decisions since 1971, are of dubious validity today.

First, the Attorney General argued that the exclusion of parochial school students from the vocational education program because of their choice of a religious education, would constitute a denial of equal protection in violation of both the Missouri and United States Constitutions. However, in *Luetkemeyer v. Kaufman*, 364 F. Supp. 376, 383 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), a similar argument was rejected. In that case, the denial of the provision of public transportation to religious school children was argued to be a violation of equal protection. In disposing of this argument, the court quoted the 1971 decision of *Brusca v. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972):

All children of every or no religious denomination have the same right to attend free secular public schools maintained by tax funds. The fact that a child or his parent for him voluntarily chooses to forgo the exercise of the right to educational benefits provided in the public school systems does not deprive him of anything by State action.

Accordingly, the denial of participation in vocational education classes because of attendance at religious schools would not be considered a state deprivation of educational benefits, but rather a waiver of those benefits by choosing not to attend public schools.

Next, the Attorney General asserted that the exclusion of students from the vocational education program because of their attendance at religious schools is an infringement on their right to freely exercise their religion. He stated that such an infringement could not stand "without the justification of a compelling interest." Op. Mo. Att'y Gen. 71-133, at 12. However, the court in *Luetkemeyer* held:

We conclude without hesitation that the 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

non-public school students is entitled to state aid for the provision of such services.

3. The Act will not change the scheduling authority of public schools providing services pursuant to the Act.

4. Public school districts will not be required to provide transportation to students receiving services under the Act.

5. A public school district may not discriminate against any resident child in the provision of special educational services because the "child regularly attends a private, parochial, parish or home school."

6. The Act will take effect on January 1, 1988.⁶

By its terms, the Act requires that public schools provide, at public expense, special educational services to students who attend sectarian schools. This requirement raises the question of whether the expenditure of public funds for such a purpose violates the religion clauses of the Missouri Constitution and the establishment clause of the first amendment of the United States Constitution.⁶

within the state's constitutional power.

Luetkemeyer v. Kaufman, 364 F. Supp. at 386. Thus, to the extent that the denial of "shared time" participation burdens the exercise of religion, such burden is justified by a compelling state interest in adherence to the state's policy of strict separation between church and state.

The Attorney General further argued that the primary effect and purpose of allowing shared time participation in vocational education services would not be aiding religious schools. Op. Mo. Att'y Gen. 71-133, at 16. However, even if the effect of the state funds spent for the provision of such services to religious school children is only to aid the child, because the student attends a religious school he will be attributed a religious purpose which will disqualify him from receiving state educational aid. *Paster v. Tussey*, 512 S.W.2d 97, 104-05 (Mo. 1974) (en banc); see *infra* notes 18-26 and accompanying text.

The Attorney General next argued that other states which prohibit "direct or indirect" aid to religion in their state constitutions nonetheless allow the provision of some benefits to religious schools. In support of this argument, the New York case of *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 234 (1967), *aff'd*, 392 U.S. 236 (1968), was cited which allowed a textbook loan program which lent books to private school students at public expense. Op. Mo. Att'y Gen. 71-133, at 19. Such a program, however, was found to be prohibited under the Missouri Constitution in the case of *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (en banc). This holding seems to undercut the Attorney General's reliance on sister states' constitutional interpretations as a guide for interpreting the Missouri Constitution's church-state separation doctrine.

Finally, the Attorney General asserted that because the first amendment of the United States Constitution and the religion clauses of the Missouri Constitution were passed for the same reasons, a federal case upholding a "released time" program should be considered relevant to deciding the status of such a program under Missouri law. Op. Mo. Att'y Gen. 71-133, at 17. But this assertion bears little weight, since even if the reasons for their promulgation were the same, Missouri consistently holds that its constitution establishes a stricter barrier between church and state than does the federal Constitution. See *supra* note 2.

5. MO. REV. STAT. § 162.996 (Supp. 1987).

6. For a listing of the Missouri Constitution's religion clauses, see *supra* note 1.

Federal establishment clause questions like the one here are dealt with by application of the three prong test found in *Lemon v. Kutzman*:⁷

1. the state program must have a secular purpose,
2. it must have a primary effect other than the advancement of religion and
3. it must not have the tendency to excessively entangle the state in church affairs.⁸

Under this analysis, the program established by the Act would probably pass federal constitutional standards. Proponents could argue that the Act's secular purpose is found in the state's interest in addressing the special educational needs of all Missouri school children and its non-religious primary effect in the provision of special educational services to resident children in need of such services. A lack of entanglement is evident in the fact that school districts need not change scheduling to accommodate the program, nor provide transportation to or from religious schools, nor send public employees into religious schools.

This argument is bolstered by the United States Supreme Court's deci-

The relevant passage of the first amendment of the United States Constitution states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof" The scope of this Note is not intended to engender an in-depth analysis of the federal constitutional issues presented by the Act, but rather is intended to review the Missouri constitutional issues raised.

In addition to the constitutional issues herein discussed, the Act is being challenged on several other grounds in the Cole County Circuit Court. Those grounds are stated in the plaintiff's petition in *Moore v. Bartman*, Case No. CV 187-1102CC, at 8-19 (Cole County Circuit Court Sept. 8, 1987), and include the following:

1. That the statute is void under the holding of *Special Dist. for the Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (Mo. 1966) (en banc). See *supra* note 4.
2. That the amendments to the bill in the House of Representatives changed the bill's original purpose, and that amendments that caused such a change are prohibited by Article III, § 21 of the Missouri Constitution. See *supra* note 3.
3. That the bill did not set forth in full all the sections to be amended, and failure to do so violates Article III, § 28 of the Missouri Constitution.
4. That the bill would require school districts to perform new activities without full state funding in contravention of Article X, § 21 of the Missouri Constitution.
7. 403 U.S. 602 (1971).
8. *Id.* at 612-13; see also *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. 1976) (en banc). An additional consideration of this test, which might be treated under the "excessive entanglement" prong, is whether the law creates "an excessive degree of political division along religious lines." J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 17.3 (1986). Under this factor the issue of the constitutionality of the present statute could go either way. During the legislative process, the bill's chief supporter was the Missouri Catholic Conference, while its major opposition came from the Missouri Baptist Convention. Although this points to a degree of political divisiveness along religious lines, whether such a degree of divisiveness would be considered "excessive" is doubtful.

sion in *Wolman v. Walter*,⁹ which held that an Ohio state aid program allowing state personnel to provide therapeutic services to private school children for health and educational disabilities at sites off of private school property did not violate the federal Constitution.¹⁰ The Court reasoned that the services were not provided in a sectarian school and thus the danger of religious permeation of the program was removed.¹¹

Regardless of the resolution of the federal constitutional question presented, however, to be a valid exercise of legislative power the Act must survive the stricter standards of church-state separation provided by the Missouri Constitution. Thus, an analysis of how Missouri's courts have interpreted the religion clauses of the Missouri Constitution is necessary.

In the 1942 case of *Harfst v. Hoegen*,¹² the Missouri Supreme Court considered a challenge to a local school board's incorporation of a catholic grade school into the state public school system. The parish school, pursuant to the school board's action, adopted the state's textbook choices and curriculum requirements. But the school continued to be staffed by nuns in religious garb, to be held on parish grounds, to begin each day with a morning prayer, to teach religion, to display religious symbols, to celebrate masses, to offer the sacrament of confession on Fridays, and to give a grade in religion on students' report cards.¹³ In holding that these actions were a violation of the Missouri Constitution, the Court announced that "our Constitution goes even further than those of some other states"¹⁴ in prohibiting indirect or direct aid to religion. The court went on to state:

The Constitutional policy of our state has decreed an absolute separation of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise.¹⁵

While the factual circumstances of *Harfst v. Hoegen* are dissimilar to those which would be expected under the Act, the announced interpretation of the religion clauses of the Missouri Constitution is relevant. In decreeing "an absolute separation of church and state" the court implies that no level of state mandated or sponsored church-state contact would be deemed acceptable under the state constitution.

9. 433 U.S. 229 (1977).

10. *Id.* at 255; see also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 17.4, at 1042-43 (1986).

11. *Wolman*, 433 U.S. at 245-48. Again, this treatment of the federal issue should not be taken as a fully researched conclusion as to federal law, since the federal implications of the Act are not the focus of this Note.

12. 349 Mo. 808, 163 S.W.2d 609 (1942) (en banc).

13. *Id.* at 811-13, 163 S.W.2d at 610-11.

14. *Id.* at 816, 163 S.W.2d at 613. Note that while the court cited Article II, § 7 of the Missouri Constitution of 1875 in making this statement, that provision is the predecessor of the identical language which appears in Article I, § 7 of the Missouri Constitution of 1945 (current version).

15. *Harfst v. Hoegen*, 349 Mo. at 817, 163 S.W.2d at 614.

The 1953 decision of *Berghorn v. Reorganized School District No. 8*,¹⁶ reaffirmed this degree of church-state separation. In that case, much like in *Harfst*, a public school district took a parochial school into the public school system. The Missouri Supreme Court affirmed the trial court's holding that:

[T]he state of Missouri has a fixed and definite policy to maintain free public schools separate and apart from all religious, church or sectarian activities and influences to the end that an absolute of choice of religion and freedom of worship shall be unaffected by any religious influences, activity, proselyting example and indoctrination through and intrusion into the free public school system of the State of Missouri. * * * That it is the unqualified policy of the state of Missouri that no public funds or properties, either directly or indirectly, be used to support or sustain any [religious school][sic]¹⁷

The 1974 case of *Paster v. Tussey*¹⁸ applied this absolute separation doctrine in invalidating a statutory program which allowed for the purchase of textbooks with public funds and the lending of those textbooks to children and teachers of both public and private elementary and secondary schools.¹⁹ After reviewing federal constitutional cases which presented strong arguments in favor of the constitutionality of the program,²⁰ the Missouri Supreme Court stated that the "disposition of this case is not controlled by federal law nor have the relevant provisions of the Missouri Constitution been made inoperative."²¹ Resolving the case under Missouri law, the court held that the lending of textbooks to teachers at private schools violated article I, section 6 of the Missouri Constitution²² because such loans "supported" a teacher of a religious "sect".²³

In treating the portion of the statute which allowed textbook loans to individual students, the court considered arguments that they adopt a "parent-pupil" benefit theory.²⁴ In so doing the court held that even if the expenditure of funds for the provision of the textbooks was an aid to the individual pupil or

16. 364 Mo. 121, 260 S.W.2d 573 (1953).

17. *Id.* at 138-39, 260 S.W.2d at 582-83; *see also* *Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974) (en banc).

18. 512 S.W.2d 97 (Mo. 1974) (en banc).

19. *Id.* at 98-99.

20. *Id.* at 103-04.

21. *Id.* at 104.

22. *See supra* note 1.

23. *Paster v. Tussey*, 512 S.W.2d at 104.

24. In its analysis of the federal law that would be relevant to the case (if the issues presented did not turn upon the stricter church-state doctrines of Missouri law), the court noted that the United States Supreme Court had based its decision in *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (a federal case dealing with a similar textbook loan program), on the "pupil benefit" or "pupil-parent benefit" theory. This theory was used to uphold the textbook loan program even though it indirectly benefited private schools. The Missouri Supreme Court considered the theory while noting that it did not decide whether it was "at liberty to do so in light of the absolute separation of church and state doctrine evidenced throughout the Missouri Constitution" *Paster v. Tussey*, 512 S.W.2d at 104.

parent, such aid contravened the restrictions of the Missouri Constitution. The court reasoned that an individual "can have and promote a sectarian purpose, and by attending a private school designed for such a purpose [does], in fact, promote the sectarian objective for which Art. IX § 8, prohibits the expenditure of public funds."²⁵ By so holding, the court announced that in Missouri one who attends a sectarian school (at the elementary and secondary level, at least) will be attributed that school's sectarian purpose and correspondingly not be allowed to receive aid from the state in the area of education.²⁶

The Court in *Mallory v. Barrera*²⁷ again applied Missouri's strict separation of church and state doctrine in prohibiting the use of federal pass-through funds for the provision of teaching services on the premises of elementary and secondary parochial schools.²⁸ In reaching this decision, the court first held that the use of the federal Title I funds was to be governed by Missouri law even though the contested expenditures had arguably been approved under federal law.²⁹ The court further held that the use of any part of the federal monies to provide teaching services in parochial primary and secondary schools would constitute both illicit aid to religion and support of a religious school.³⁰ The case stands as another example of the Missouri Supreme Court's application of the state's own separation of church and state doctrine rather than that of federal law, and of the court's unwillingness to allow state mandated or sponsored contact between secular and public schools.

While the *Harfst*, *Berghorn*, *Paster*, and *Mallory* cases based their holdings on the provisions of the Missouri Constitution which explicitly prohibit aid to religious sects or schools,³¹ the Missouri Supreme Court has also relied on article IX, section 5 of the Missouri Constitution (which provides that public school funds shall be used only to support public schools)³² to prohibit con-

25. *Id.* at 104-05.

26. See Note, *Constitutional Law — An Unqualified Policy on Public Aid to Non-Public Schools*, 40 MO. L. REV. 342, 347 (1975) (discussing *Paster v. Tussey* and Missouri's rejection of the child benefit theory).

27. 544 S.W.2d 556 (Mo. 1976) (en banc).

28. *Id.* at 561. The court also held that the use of such funds to provide textbooks and transportation was violative of the Missouri Constitution. *Id.* at 562.

29. *Id.* at 561.

30. *Id.*; see also Op. Mo. Att'y Gen. No. 79-31 (Jan. 10, 1979); Op. Mo. Att'y Gen. No. 77-102 (May 16, 1977) (both opinions concluding that educational service programs funded by federal Title I funds could not be conducted on the premises of sectarian schools).

31. See *supra* note 1.

32. MO. CONST. art. IX, § 5 states:

The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for the establish-

tact between public and religious schools. In *McVey v. Hawkins*,³³ taxpayers of Commerce Consolidated School District (hereinafter "Commerce") sought to enjoin the school district's provision of transportation to parochial school children.³⁴ Commerce allowed the parochial school children to ride a publicly owned, maintained and operated schoolbus from designated stops in the Commerce District to the district's boundary line with the adjoining Benton School District. The parochial school was located in the Benton district.³⁵ Uncontradicted evidence showed that the bus traveled no further than it would have if only transporting the public school students, did not change its route nor stops to accommodate the parochial school students, did not need to increase the number of buses used to transport Commerce students, and incurred no additional expenses whatsoever in the transport of the parochial school students.³⁶ Nor did Commerce include the parochial school students in their requests for state aid.³⁷

Notwithstanding these facts, the Court held that the "Commerce District was using public school funds to transport the parochial school children to a private school,"³⁸ that this use was not "for the purpose of maintaining free public schools and that such use of said funds is unlawful."³⁹

In the 1966 case of *Special District for the Educ. & Training of Handicapped Children v. Wheeler*,⁴⁰ the Missouri Supreme Court followed the article IX, section 5 analysis of *McVey* in holding that a program in which public funds were spent to send speech therapy teachers from the Special School District of St. Louis County into parochial schools was not an expenditure of public school funds for the purpose of "maintaining free public schools."⁴¹ The court accordingly held that the program was not permitted by the Missouri Constitution.

The combination of these cases shows Missouri's strict policy of church-state separation in the area of aid to religiously oriented primary and secondary schools. The Missouri Supreme Court has announced that the state Constitution establishes an absolute separation of church and state in educational matters.⁴² The court has eliminated the possibility of a "pupil-parent benefit theory" justification of statutes or programs providing aid to parochial school

ing and maintaining of free public schools, and for no other purposes whatsoever.

33. 364 Mo. 44, 258 S.W.2d 927 (1953) (en banc).

34. *Id.* at 47, 258 S.W.2d at 927.

35. *Id.* at 48, 258 S.W.2d at 928.

36. *Id.* at 54, 258 S.W.2d at 932.

37. *Id.* at 51, 258 S.W.2d at 930.

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

39. *Id.* at 56, 258 S.W.2d at 934.

40. 408 S.W.2d 60 (Mo. 1966) (en banc).

41. *Id.* at 63. For other issues considered in the *Wheeler* decision, see *supra* note 4 and accompanying text.

42. *Harfst v. Hoegen*, 349 Mo. 808, 817, 163 S.W.2d 609, 614 (Mo. 1942) (en banc).

students⁴³ and has invalidated levels of church-state contact which are permitted by the United States Constitution.⁴⁴ This is not to say, however, that the court automatically invalidates every statute or program calling for church-state contact upon which it has the opportunity to pass.

In the 1961 case of *Kintzele v. St. Louis*⁴⁵ the court considered a challenge to the sale of land by the St. Louis Land Clearance for Redevelopment Authority to St. Louis University, a catholic university.⁴⁶ The Supreme Court affirmed the trial court's rejection of the challenge to the sale as "an unconstitutional use of public power and public funds in aid of a private sectarian school controlled by a religious denomination . . ."⁴⁷ The trial court found that the University had been given no special or unfair consideration in the bidding process and that it had paid "not less than the fair value of the land."⁴⁸ Quoting a New York Court of Appeals case, the Missouri Supreme Court agreed that the sale was "an exchange of considerations and not a gift or subsidy, [and thus] no 'aid to religion' is involved. . . ."⁴⁹

In *Americans United v. Rogers*⁵⁰ the court upheld a state program which provided grants directly to Missouri college students attending both public and private Missouri colleges.⁵¹ After a discussion of federal law,⁵² the opinion considered the Missouri constitutional issues involved. The court determined that the payment of grants directly to an individual was not a violation of Missouri constitutional provisions prohibiting taxation for anything but public purposes⁵³ and prohibiting the granting of public money to private persons.⁵⁴ The court then turned to the church-state issues controlled by the Missouri Constitution. In upholding the program, the court relied on both the "exchange of considerations" argument of *Kintzele*⁵⁵ and a distinction in the na-

43. *Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974) (en banc).

44. *See supra* note 2.

45. 347 S.W.2d 695 (Mo. 1961) (en banc).

46. *Id.* at 698.

47. *Id.* at 697.

48. *Id.* at 699.

49. *Id.* at 700 (quoting 64th St. Residences, Inc. v. New York, 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1 (1958), *cert. denied*, 357 U.S. 907 (1958)).

50. 538 S.W.2d 711 (Mo. 1976) (en banc).

51. *Id.* at 721-22; *see also* Op. Mo. Att'y Gen. No. 79-84 (Aug. 27, 1984).

52. 538 S.W.2d at 716-18.

53. *Id.* at 718-20. MO. CONST. art. X, § 3 states:

Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law.

54. 538 S.W.2d at 718-20; *see also supra* note 1.

55. *Kintzele v. St. Louis*, 347 S.W.2d 695 (Mo. 1961) (en banc).

ture of higher education from that of elementary and secondary education.⁵⁶

The exchange of considerations analysis reasoned that because the fees paid by a student to a religious university are in exchange for a college education and often do not even cover the costs of the institution in providing that education, it is questionable whether grants to students to help pay such fees could be considered aid to that religious institution.⁵⁷ The enrollment of each additional student gives rise to obligations not covered by that student's tuition and thus forces the school to have to find additional funding from some other sources. The court questioned whether the encouragement of the creation of such additional obligations could be considered aid.⁵⁸

More importantly, the decision drew controlling distinctions between higher education and elementary and secondary education. The court noted that the state provides a free public education to all on the elementary and secondary level and those who choose not to accept that free education and attend a private school do so at their own behest and expense.⁵⁹ The court then stated, "In contrast, the state does not provide a free college education and we believe that attendance at other than public institutions at that level does not have the same religious implications or significance. . . ." ⁶⁰ Finally, the court pointed out that the Missouri Constitution prohibits aid to institutions controlled by churches or religious sects. In the challenged statute the institution attended by the student receiving a grant was required to be run by an "independent board."⁶¹ Thus, the court upheld the grant program as distinguishable from its previous parochial school decisions:

we take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: 'Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background in faculty and students.'⁶²

Relying at least in part on the higher education distinction of *Americans United*, the Court in *Menorah Medical Center v. Health and Educational Facility Authority*⁶³ upheld a plan which allowed the Health and Educational Facility Authority (hereinafter "Authority") to purchase certain facilities with tax exempt bond proceeds and lease those facilities to the Menorah Medical Center (hereinafter "Menorah"), a hospital run by a Jewish board of direc-

56. See *Americans United v. Rogers*, 538 S.W.2d 711, 720-21 (Mo. 1976) (en banc).

57. *Id.* at 721.

58. *Id.*

59. *Id.* at 720-21.

60. *Id.* at 721.

61. *Id.*

62. *Id.* at 722.

63. 584 S.W.2d 73 (Mo. 1979) (en banc).

tors.⁶⁴ In holding that the scheme did not violate the Missouri nor the federal Constitution, the court stated that it was only ruling on the "excessive entanglement" issue of the federal test. It noted several reasons why this issue was not implicated, including: 1. the lack of direct state involvement ("The Authority does not become a subdivision of the state simply because it deals with tax exempt bonds and there is no impairment of state credit involved. Thus, the state is not involved in establishing religion."⁶⁵), 2. the lack of a sectarian purpose, 3. the funds involved being used in a neutral fashion, and 4. the facilities involved were used at the higher education level — as opposed to the elementary and secondary level.⁶⁶

The *Kintzele*, *Americans United*, and *Menorah* cases represent three situations in which the Missouri Supreme Court did not invalidate church-state contact. Each of the cases involved religious institutions on the higher education level, which are considered of a different nature for Missouri constitutional purposes. Two involved "exchange of consideration" issues and the other questioned the existence of any state action. Thus, the pivotal question for purposes of a state constitutional analysis of the Missouri General Assembly's enactment of the previously described sections of the Special Needs Adoption Tax Credit Act is whether the Act is more appropriately treated by the principles of the *Kintzele*, *Americans United*, *Menorah* cases or the *Harfst*, *Paster*, *McVey* line of cases.

Because the Act deals with the provision of special education services on the elementary and secondary level and not the higher education level, it contains a distinction which the Missouri Supreme Court considered important in

64. *Id.* at 76.

65. *Id.* at 87.

66. *Id.* The court treated the church-state issues in *Menorah* in a short and cursory fashion. Unlike the previous church-state cases considered herein, the court made no distinction between the constitutional analysis necessary on the state as opposed to federal level. Instead, it lumped the analysis together, after stating that in *Americans United* Missouri accepted the *Lemon v. Kutzman* "three-prong test." See *supra* notes 7-8 and accompanying text. This statement is problematic in that in *Americans United* the court applied the *Lemon v. Kutzman* analysis to the federal establishment clause issues but not to the church-state separation issues under the Missouri Constitution. Perhaps this disparity can be explained by the court's rather quick treatment of the church-state issues presented and their finding of several grounds to dismiss the church-state argument. Some of these grounds would be applicable to both constitutions (*i.e.*, the distinction between higher education and primary and secondary education and the lack of direct state involvement), and some only applicable to the federal constitution (*i.e.*, public purpose and the neutral fashion in which the funds are used). Whatever the reason, it is very doubtful that the court intended to discard its long-established and strict level of church-state separation in a five paragraph treatment of a unique factual situation. Further, the *Menorah* court only dealt with the "excessive entanglement" prong of the *Lemon v. Kutzman* test. The Missouri Supreme Court, in the leading church-state cases herein mentioned, never explicitly nor impliedly relied on such a test in reaching its decisions as to church-state issues. Thus, the meaning of Missouri "recognizing this test" is unclear.

Americans United.⁶⁷ In addition, the program does not require the private, parochial, parish or home schools to pay for the services provided to their students, and thus *Kintzele*'s "exchange of consideration" rationale⁶⁸ is also inapplicable. Finally, to the extent *Menorah*'s holding can be considered relevant to church-state educational aid under Missouri constitutional law, two controlling distinctions are present: first, the present program unquestionably engenders state expenditures and state action, and second, the Act deals with elementary and secondary institutions rather than those at a higher education level.⁶⁹

The *Harfst*, *Paster*, *McVey* line of cases is more directly applicable to the program established by the Act. While the provision of special educational services mandated by the Act does not reach the level of church-state contact as the incorporation of a parish school into the public school system as in *Harfst*, the "absolute separation of church and state"⁷⁰ is breached by the state mandated and funded provision of educational services to religious school students.

Correspondingly, to the extent that sectarian schools are relieved of the responsibility of furnishing special educational services because their students may obtain such services at public schools, the "unqualified policy of the State of Missouri that no public funds or properties, either directly or *indirectly*, be used to support or sustain any school affected by religious influences. . . ."⁷¹ is violated.⁷² Once the program established by the Act is in place, parochial schools need not hire teachers with the special qualifications necessary to work with children who require special services, nor will they be forced to purchase the educational equipment and materials used in the provision of such services. To the degree that religious schools are able to save money by not providing special education services, the Act works as an indirect aid to those schools.

In addition to the application of these broad prohibitions of church-state contact in the area of education, the court's treatment of the "pupil-parent

67. *Americans United v. Rogers*, 538 S.W.2d 711, 720-21 (Mo. 1976) (en banc).

68. *Kintzele v. St. Louis*, 347 S.W.2d 695, 700 (Mo. 1961) (en banc).

69. *Menorah v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 87 (Mo. 1979) (en banc).

70. *Harfst v. Hoegen*, 349 Mo. 808, 817, 163 S.W.2d 609, 614 (1942) (en banc).

71. *Berghorn v. Reorganized School Dist. No. 8*, 364 Mo. 121, 138, 260 S.W.2d 573, 582 (1953) (emphasis added).

72. Bart Tichenor, attorney for the Missouri Baptist Convention, takes this argument even further. He argues that by allowing parochial schools to rely on the state for the provision of specialized services in one area of the schools' curriculum, the Act opens the floodgates to programs in other areas. While the Act only allows for the provision of "special educational services," the same principles which motivated the Act's passage could apply, mandating the provision of industrial arts, home economics classes, advanced laboratory science and computer classes. Thus, although the degree of aid afforded by relieving parochial schools of one specialized curricular responsibility seems small, the potential for expansion of such relief could hardly be characterized as insignificant. Telephone interview with Bart Tichenor, Attorney for the Missouri Baptist Convention (April 8, 1988).

benefit theory" in *Paster v. Tussey* is applicable to the Act more directly. Under the analysis of *Paster*, even if the provision of special education services to students of religious schools is considered simply an aid or benefit to the pupil or his parents, such a benefit would nonetheless be held constitutionally impermissible in Missouri. Because of the student's attendance of a sectarian school he is assumed to be an adherent "of the same sectarian purpose"⁷³ as possessed by the school. He is deemed to promote a sectarian objective for which the expenditure of public funds is prohibited.⁷⁴ Accordingly, he could not receive state funded educational benefits.

To the extent that the holding in *Mallory v. Barrera*⁷⁵ is based on the fact that the teaching services provided were impermissible because they were provided on parochial school property, the case seems to add little to the analysis of the program established by the Act. A broader reading of the case, however, could cut in favor of or against the Act's validity. The case could be read to hold that only teaching aid provided on sectarian school premises is violative of the Missouri Constitution and teaching services provided on non-religious property is acceptable. However, such an inference would extend the holding of the case far beyond the facts upon which the court ruled. Nonetheless, if this reading of the case were supported by any later Missouri decisions, it would seem dispositive of the issue presented by the Act (in that the Act provides for services to be provided to non-public school students on public school property). However, this reading has not been bolstered by any later Missouri decisions.

A more expansive reading of the *Mallory* case could cut against the Act's validity. The holding could be viewed as prohibiting the provision of publicly funded teaching services to parochial school students. Again, this interpretation would extend far beyond the facts of the case. While there are no subsequent Missouri cases supporting this reading, it would seem to accord with the "absolute separation of church and state" doctrine announced in *Harfst*⁷⁶ and respected in later cases.

McVey v. Hawkins,⁷⁷ while seemingly dissimilar to the Act, provides several factual comparisons which are helpful in analyzing the Act under the Missouri Constitution's prohibition of spending public school funds for any purpose other than the maintenance of public schools.⁷⁸ The transportation services provided in *McVey* are comparable to the education services required by the Act in that both are publicly funded services provided off the premises of the parochial or private school. In both situations, public officials were (or are) not called upon to change schedules nor make special accommodations for parochial school students. Although in *McVey* the transportation services pro-

73. *Paster v. Tussey*, 512 S.W.2d 97, 104-05 (Mo. 1974) (en banc).

74. *Id.*

75. 544 S.W.2d 556 (Mo. 1976) (en banc).

76. *Harfst v. Hoegen*, 349 Mo. 808, 817, 163 S.W.2d 609, 614 (1942) (en banc).

77. 364 Mo. 44, 258 S.W.2d 927 (1953) (en banc).

78. MO CONST. art. IX, § 5; see *supra* note 1.

vided did not cost the school district any additional funds and the transportation of parochial school children was not included in state aid calculations, the transportation services were still held to be violative of the Missouri Constitution because they were not for the purpose of establishing or maintaining public schools.⁷⁹

Thus, the fact that the state is required under the Act to pay for the provision of special education services to participating parochial school children, and is required to provide such services even if doing so might require additional salary and capital expenditures, places the Act in dubious constitutional standing under the *McVey* holding. Unless the provision of special education services to *religious school students* can be shown in some way to aid in the maintenance and support of free public schools, the program would seem destined for the same fate as was the transportation services provided in *McVey v. Hawkins*.

While the type of services provided in *Special District for the Educ. & Training of Handicapped Children v. Wheeler*⁸⁰ are similar to those which would be provided by the Act, the usefulness of the case is limited in the same way as *Mallory v. Barrera*⁸¹ above. Although the case holds that the provision of this type of service in parochial schools is impermissible because it is not for the purpose of maintaining free public schools,⁸² it does not reach the issue of whether the same would be true were the services provided on public school property.

To aggregate the analysis, reasoning and application of Missouri constitutional law in cases involving contact between public bodies and religious schools in such a way as to predict the outcome of the question of the validity of the provisions of the "Special Needs Adoption Tax Credit Act" which involve public schools in the provision of special educational services to private school students is an elusive goal. However, the identification of several broad trends or generalities is possible. First, the Missouri Supreme Court has jealously protected the state's restrictive policy of the separation of church and state and is willing to reject federal characterizations of church-state issues in order to preserve this strict separation doctrine. Further, the doctrinal exceptions made to the state's "absolute separation" policy are few and seem to exclude elementary and secondary education. Finally, on the elementary and secondary level, the court over many years has reviewed and invalidated various types of public school-religious school contacts which are permitted under federal law. Against this background, the probability of success of the Act is slight.

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79. *McVey v. Hawkins*, 364 Mo. at 56, 258 S.W.2d at 933-34.

80. 408 S.W.2d 60 (Mo. 1966) (en banc).

81. 544 S.W.2d 556 (Mo. 1976) (en banc).

82. *Wheeler*, 408 S.W.2d 60 at 63.

