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Constitutional Law-A Comparison of Missouri and Federal Standards for State Aid to Non-Public Schools

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conduct by supervisors is not occurring.²⁸ Liability should be imposed upon the employer for discriminatory acts by *low level employees* unless the employer has taken reasonable steps to insure that there is a discrimination-free working environment.²⁹ This test clearly states when the employer will be liable for employee actions and makes it easy for employers to understand what must be done to avoid liability. It also more effectively implements the policy of the Missouri Act to end employment discrimination because it requires that the employer take reasonable steps to insure that there is no discrimination occurring at *any* employee level.

DUANE E. SCHREIMANN

CONSTITUTIONAL LAW—A COMPARISON OF MISSOURI AND FEDERAL STANDARDS FOR STATE AID TO NON-PUBLIC SCHOOLS

*Americans United v. Rogers*¹

The corporation Americans United challenged the constitutionality of the Missouri Financial Assistance Program, seeking a declaratory judgment and injunction to prohibit enforcement of the statute which provided tuition grants to college students attending approved public and private colleges.² The trial court held the program unconstitutional as a violation of the first amendment of the United States Constitution and of several provisions of the Missouri Constitution.³ The Missouri Supreme Court reversed, sustaining the constitutionality of the statute under both state and federal constitutions.⁴

It has long been recognized that the Missouri standard for maintaining the separation of church and state is more restrictive than the federal approach.⁵ This is partially the consequence of the numerous Missouri

28. The application of this test to the facts in the present case would arrive at the same result. Since the supervisor was acting in his supervisory capacity (hiring), the proposed test would impose liability.

29. Those "reasonable steps" could include such actions as weekly management visits to the various departments of the business to see that there is no discrimination occurring, instructing employees to notify the employer immediately if they feel they have been or are being subjected to discrimination, employer supervision of any disciplinary actions, etc.

1. 538 S.W.2d 711 (Mo. En Banc), *cert. denied*, 97 S. Ct. 653 (1976).

2. §§ 173.200-235, RSMo (Supp. 1975).

3. MO. CONST. art. I, §§ 6-7, art. III, § 38(a), art. IX, § 8, art. X, § 3.

4. 538 S.W.2d at 713.

5. *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 386 (W.D. Mo. 1973), *aff'd*

constitutional provisions specifically prohibiting appropriations of money in aid or support of any religious creed, church, or sectarian denomination.⁶ In addition, the Missouri Supreme Court has established a constitutional policy which sanctions the absolute separation of church and state in educational matters.⁷ The combination of this absolutist approach and the restrictive constitutional provisions has resulted in a series of decisions in which the Missouri Supreme Court has declared unconstitutional appropriations of money to support parochial schools as part of the public school system,⁸ to provide transportation to children attending private schools,⁹ and to loan textbooks to parochial school children.¹⁰

Under the less restrictive federal approach, state aid to non-public schools is permissible under the first amendment when the state aid has a secular purpose, does not have a primary effect which advances or inhibits religion, and does not tend to excessively entangle the state in church affairs.¹¹ Following these principles, the United States Supreme Court has

mem., 419 U.S. 888 (1974); *Paster v. Tussey*, 512 S.W.2d 97, 101 (Mo. En Banc 1974), *cert. denied*, 419 U.S. 1111 (1975); *Berghorn v. Reorganized School Dist. No. 8*, 364 Mo. 121, 138, 260 S.W.2d 573, 582 (1953); *Harfst v. Hoegen*, 349 Mo. 808, 816, 163 S.W.2d 609, 614 (En Banc 1942). A good discussion of the development of Missouri's unqualified policy of absolute separation of church and state prior to *Rogers* is contained in Kurtz, *Constitutional Law—An Unqualified Policy on Public Aid to Non-Public Schools*, 40 MO. L. REV. 342 (1975).

6. Relevant state constitutional provisions are set forth as follows:

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

MO. CONST. art. I, § 6.

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

MO. CONST. art. I, § 7.

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

MO. CONST. art. IX, § 8. In *Rogers* the Missouri Supreme Court particularly focuses upon the issue of what constitutes "aid" or "support" within the meaning of these provisions.

7. *Harfst v. Hoegen*, 349 Mo. 808, 816, 163 S.W.2d 609, 614 (En Banc 1942). See note 5 *supra* and accompanying text.

8. *Berghorn v. Reorganized School Dist. No. 8*, 364 Mo. 121, 260 S.W.2d 573 (1953); *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (En Banc 1942).

9. *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (En Banc 1953).

10. *Paster v. Tussey*, 512 S.W.2d 97 (Mo. En Banc 1974), *cert. denied*, 419 U.S. 1111 (1975).

11. *Wolman v. Walter*, 97 S. Ct. 2593 (1977); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The "primary effect" test has been substantially refined in *Hunt v. McNair*, 413 U.S. 734 (1973).

sustained state appropriations which provide transportation to children attending private schools,¹² loan textbooks to parochial school children,¹³ provide federal construction grants to private colleges,¹⁴ provide tuition grants directly to non-public colleges,¹⁵ and provide parochial school children with standardized testing, diagnostic, therapeutic, and remedial services.¹⁶ On the other hand, where state aid has been given to schools which are so permeated by religion that students are "coerced" into conforming to religious pressures exerted through the educational process, the Court has invalidated the aid as an abridgment of the first amendment free exercise clause.¹⁷ As a practical matter, such "coercion" is likely to be found at the primary and secondary levels but not at the college level because college students are less susceptible to religious indoctrination, and because the atmosphere of academic freedom on college campuses minimizes the opportunities for sectarian influence.¹⁸

In view of the prior Missouri decisions prohibiting the use of public money to provide assistance of any kind to private schools, the *Rogers* decision indicates a departure from the traditional policy of absolute separation of church and state. It marks the first time that the Missouri Supreme Court has sustained statutory appropriations which result in a flow of money into private educational institutions.

The first factor the court used to distinguish *Rogers* from the prior Missouri decisions prohibiting aid to non-public schools¹⁹ was the concept that the statute was designed and implemented for the benefit of the students and not the institutions.²⁰ Thus, the Missouri Supreme Court adopted the "child benefit" theory in determining that tuition grants to students attending private colleges did not constitute "aid" or "support" to

In *Hunt* the Supreme Court has determined that aid has a primary effect other than the advancement of religion

when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Id. at 743.

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

13. *Wolman v. Walter*, 97 S. Ct. 2593 (1977). *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Cochran v. Louisiana Bd. of Educ.*, 281 U.S. 370 (1930).

14. *Tilton v. Richardson*, 403 U.S. 672 (1971).

15. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

16. *Wolman v. Walter*, 97 S. Ct. 2593 (1977).

17. *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)(prohibiting tuition grants to non-public elementary and secondary schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1971)(prohibiting salary supplements to teachers of secular subjects in non-public elementary schools); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948)(prohibiting released-time instructional programs conducted in public schools for religious purposes).

18. 538 S.W.2d at 721.

19. See notes 8-10 and *supra* accompanying text.

20. 538 S.W.2d at 720.

the institutions as prohibited by the Missouri Constitution.²¹ The court in *Rogers* rejected the contention that state funded tuition payments aid the institutions by releasing university funds for non-secular uses.²² The court emphasized the fact that the students are the direct recipients of the awards, indicating that the grants might have been invalidated had they been awarded directly to the institutions.

The "child benefit" theory has been utilized by the United States Supreme Court to sustain the constitutionality of state appropriations for the transportation of parochial school children²³ and for providing text-book loans to students.²⁴ Prior to *Rogers* the theory received attention in two Missouri cases,²⁵ each of which declined to consider the theory as a controlling factor in determining whether the aid was permissible.

The majority in *Rogers* also determined that tuition payments are not grants "in aid of" the institutions by utilizing an "exchange of considerations" concept.²⁶ Although the funds for tuition grants are furnished initially by the state, a contractual relationship exists between the university and its students. When a student uses the grant to pay for his or her tuition, the payment cannot be considered as a gift or donation to the university because it creates a reciprocal obligation on the part of the university to furnish the student with a college education.²⁷ The court in *Rogers* maintained that the "exchange of considerations" theory could only be applied where the school is a non-profit organization.²⁸ The court indicated that tuition payments should be treated as "aid" to the university where the amount of tuition received exceeds the cost of providing an education to its students.²⁹

There is no clear formula for determining which types of aid might be sustained under the "exchange of considerations" theory, and its role in sustaining future appropriations to non-public schools is questionable.³⁰ The applicability of the theory is limited in at least three respects. First, it is clear that the schools receiving the tuition payments must be operated on a non-profit basis. Secondly, the theory can be utilized only where a private contractual relationship exists between the school and its students. Finally, where the contract is to provide aid or services of a religious nature, or where the school receiving the aid is distinctly religious in character, the aid

21. Particular reference to "aid" or "support" is made in MO. CONST. art. I, §§ 6-7, art. IX, § 8. See note 6 *supra*.

22. 538 S.W.2d at 717.

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

24. *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Cochran v. Louisiana Bd. of Educ.*, 281 U.S. 370 (1930).

25. *Paster v. Tussey*, 512 S.W.2d 97 (Mo. En Banc 1974), *cert. denied*, 419 U.S. 1111 (1975); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (En Banc 1953).

26. See *Kintzele v. City of St. Louis*, 347 S.W.2d 695, 700 (Mo. En Banc 1961).

27. *Id.* at 700.

28. 538 S.W.2d at 721.

29. *Id.*

30. *Id.*

cannot be upheld on an "exchange of considerations" basis.³¹ It is doubtful that statutory provisions for textbook loans or transportation for parochial school children could be sustained on this basis because the educational institution owes no contractual obligation to its students with respect to any benefit it may receive from such a program. It is conceivable that tuition grants to students attending private elementary or secondary schools could be upheld by applying the same "exchange of considerations" rationale used in *Rogers*. Yet the United States Supreme Court has invalidated state-funded tuition grants to private elementary schools on the ground that excessive administrative oversight would have been necessary to ensure that the aid complied with the "primary effect" test.³²

Although the "child benefit" and "exchange of considerations" theories provided the means for broadening the scope of permissible aid to private schools in Missouri, the court in *Rogers* restricted their applicability to aid at the college level. The court pointed out a significant factual distinction between the availability of educational opportunities at the college level and at the elementary or secondary level. In the latter instance, tax money is used to support a free educational system. As a consequence, the parents' choice to send their children to a private school is a self-imposed burden, and expenditures for those who reject the free education are constitutionally prohibited.³³ Because a free education is unavailable to college students, the state presumably has a greater interest in subsidizing students through individual tuition grants, regardless of whether the students attend public or non-public colleges.³⁴ Prior Missouri decisions prohibiting appropriations at the elementary and secondary levels were emphatically supported by the majority in *Rogers* on this ground.³⁵ The United States Supreme Court has also distinguished between the two educational levels, but on a different basis. The Supreme Court has declared that children at the lower level are particularly susceptible to religious indoctrination, especially where the pressure to conform to religious practices is exerted by the teachers or by the distinctly religious character of the school. The Court has invalidated state aid flowing to parochial schools in which this coercive atmosphere prevailed because the character of the schools impaired students' first amendment free exercise rights.³⁶ Although the Missouri Supreme Court completely foreclosed state aid to elementary and secondary schools, the United States Supreme Court has been willing to sustain the aid where the coercive effect of religious indoctrination was greatly minimized.

The court in *Rogers* also sustained the constitutionality of the Missouri

31. See text accompanying note 40 *infra*.

32. *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). See note 11 *supra* and accompanying text.

33. 538 S.W.2d at 720-21.

34. *Id.*

35. *Id.* at 720.

36. See note 16 *supra* and accompanying text.

Financial Assistance Program under federal standards.³⁷ First, the court stated that the statute had a secular purpose.³⁸ Both state and federal courts have consistently recognized that an educated citizenry contributes to the economic and social welfare of the state. Legislation designed to facilitate the opportunity of children to get an education clearly has a secular purpose.

The court in *Rogers* also concluded that the statutory program did not have a primary effect which advances religion.³⁹ The "primary effect" test requires that the aid not flow to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission and that the aid not fund a specifically religious activity in an otherwise substantially secular setting.⁴⁰ Without examining the character of the particular institutions involved, the court in *Rogers* stated that these requirements were met. However, the United States Supreme Court has sustained the constitutionality of state aid in challenges similar to *Rogers* only after first examining the schools receiving aid in order to ascertain whether the "primary effect" test is satisfied.⁴¹ In light of this practice of the Supreme Court, it is clear that in future challenges of appropriations under the Missouri statutory program the Missouri courts must consider whether the schools receiving tuition payments meet the "primary effect" test. Thus, even though the Missouri statutory program is facially constitutional, some tuition grants to college students may be invalid if the schools benefitting from such grants serve predominantly religious purposes.

The court in *Rogers* further determined that the implementation of the statutory program did not excessively entangle the state in church affairs.⁴² The absence of state administrative oversight and the diminished coercive effect of religious influences at the college level sufficiently guard against excessive church-state involvement. At the elementary level the threat of religious indoctrination necessitates greater state administrative supervision, and the federal courts are more inclined to invalidate the state aid on the ground of excessive church-state entanglement.

In light of the foregoing Missouri and federal theories on aid to non-public schools it is not likely that *Rogers* will have any significant impact on the impermissibility of appropriating public money to provide transportation to children attending private schools in Missouri. This is especially true if income from the Public School Fund were to be used to fund such transportation because it is prohibited by the Missouri Constitution.⁴³ Fur-

37. See note 11 *supra* and accompanying text.

38. 538 S.W.2d at 717.

39. *Id.* at 721. See note 11 *supra* and accompanying text.

40. *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

41. *Roemer v. Board of Public Works*, 426 U.S. 736, 762 (1976). See also *Hunt v. McNair*, 413 U.S. 734, 744 (1973); *Tilton v. Richardson*, 403 U.S. 672, 682 (1971).

42. 538 S.W.2d at 718.

43. *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (En Banc 1953).

thermore, transportation of students at the elementary and secondary levels is disfavored on the ground that the decision of the parents to send their children to private schools is a self-imposed burden which should not be alleviated by the state.

Similarly, statutory authorization to provide tuition grants to children attending such schools cannot reasonably be expected to receive favor in the face of the "self-imposed burden" argument. The United States Supreme Court also has stricken this type of aid because an excessive church-state involvement is necessary to protect against unconstitutional use of the funds.⁴⁴

There is a much greater likelihood that a statutory program providing funds for textbook loans to students attending private colleges will be sustained as a result of *Rogers*. If such a program is to be upheld it must provide the textbooks directly to the students and not to the institutions. In addition, the program must provide statutory safeguards similar to those in *Rogers* to insure that the state agency administering the program complies with constitutional standards.⁴⁵ The United States Supreme Court has upheld textbook loans to elementary schools,⁴⁶ thus removing any impediment at the federal level. However, the Supreme Court has invalidated state appropriations for the purchase and loan of instructional materials other than books, reusable workbooks, or manuals to parochial school children on the ground that such materials are inextricably intertwined with a teaching process which is itself devoted to religious purposes.⁴⁷

Appropriations to private colleges for building construction grants may be sustained as a result of *Rogers*. Though the court may be reluctant to consider a grant made to the institution as a direct benefit to the student, the grant possibly could be considered an exchange for the university's agreement to use the buildings solely for secular purposes.⁴⁸ Construction grants to private colleges have been sustained by the United States Su-

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

45. In *Roemer v. Board of Public Works*, 426 U.S. 736, 760 (1976), the United States Supreme Court indicated that such statutory programs must include a specific prohibition against the use of aid for religious purposes in order to satisfy constitutional requirements.

46. *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Cochran v. Louisiana Bd. of Educ.*, 281 U.S. 370 (1930).

47. *Wolman v. Walter*, 97 S. Ct. 2593 (1977). In *Wolman* these instructional materials included projectors, tape recorders, record players, maps, globes, science kits, weather forecasting charts, and the like. *Id.* at 2606.

48. See *64th St. Residences, Inc. v. City of New York*, 4 N.Y.2d 268, 174 N.Y.S.2d 1, 150 N.E.2d 396, *cert. denied*, 357 U.S. 907 (1958), in which the City of New York sold land to Fordham University for less than the purchase price paid by the city. The New York Court of Appeals held that the difference in price was not a gift or subsidy to the university, but was an "exchange of consideration" for the university's agreement to raze the buildings, relocate the tenants, and use the property for a college campus only.