California Education Code Section 37113 - Permitting Parochial School Children to Attend Public School Classes Violates the California Constitution

William Klein
CALIFORNIA EDUCATION CODE SECTION
37113—PERMITTING PAROCHIAL SCHOOL
CHILDREN TO ATTEND PUBLIC SCHOOL CLASSES
VIOLATES THE CALIFORNIA CONSTITUTION

I. INTRODUCTION

Within the spectrum of controversial issues inherent in the relationship between church and state, one of the most difficult to resolve is the constitutionality of public aid to private church-related schools. The California Education Code, section 37113 (hereinafter referred to as section 37113), permits high school students who are regularly enrolled in nonpublic schools to attend public vocational and science classes. Implicit in this section is the possibility that religiously-affiliated schools would receive public aid in violation of the doctrine...
separating church and state. This comment concludes that section 37113 does in fact give public aid to church-affiliated schools and therefore violates the aforementioned doctrine as established in the California Constitution. 

Although the doctrine of separation of church and state is as old as our country, the extent to which a given type of public aid to parochial schools violates the doctrine has been the subject of heated debate.

(parochial schools). Further, most statutes, which have been challenged as involving state aid to parochial schools have similarly only referred to nonpublic schools. Calif. Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981); Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946). See also Mueller v. Allen, ___ U.S.____, 103 S. Ct. 3062 (1983); Everson v. Bd. of Educ., 330 U.S. 1 (1947). On this same point the U. S. Supreme Court has looked to see if the schools which benefitted from the government program had a predominantly religious character. Meek v. Pittenger, 421 U.S. 349 (1975). In Meek, the Court found persuasive the fact that 75% of the eligible private students came from religiously-affiliated schools. Id. at 364.

3. Unfortunately, § 37113 does not require school districts to keep specific records concerning implementation of the statute. See supra note 1. Consequently, it is difficult to determine the exact extent to which the statute is used. In the Los Angeles School Dist., for example, a reported total of 24 nonpublic students attend public classes pursuant to § 37113. Los Angeles School District Budget, 1982-83, p. A-3 (1983). This figure, however, may not be representative of the actual number of parochial school children attending public classes in Los Angeles. The reason for this is that many schools within the school district have simply followed the language of § 37113 and included the number of nonpublic students attending public classes into their regular computation of daily attendance, making no distinction between the two. See supra note 1 for text of § 37113. Only those schools that have actually gone beyond the requirements of the statute and prepared separate line items for nonpublic and public student attendance would appear on the district-wide report.

Even if the actual number of nonpublic students attending public classes pursuant to § 37113 is minimal, there is precedent that when the issue involves the potential receipt of state aid by parochial schools, the doctrine should be considered despite the amount of money expended. Thus, for example, in Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978), the California Supreme Court ruled unconstitutional the expenditure of $103 for a single-barred cross on the Los Angeles City Hall. As Chief Justice Bird explained in her concurrence, the California prohibitions to aid religion "would come into play even if no funds are expended. The ban is on aid to religion in any form." Id. at 806, 587 P.2d at 672, 150 Cal. Rptr. at 876. See also California Educ. Facilities Auth. v. Priest, 12 Cal. 3d 593, 605 n.12, 526 P.2d 513, 522 n.12, 118 Cal. Rptr. 361, 369 n.12. See also Bowker v. Baker, 73 Cal. App. 2d 653, 656, 167 P.2d 265, 258 (1946) (in this case, only 17 parochial school children were involved).

4. See Reynolds v. United States, 98 U.S. 145 (1878). The Court quoted a letter by Thomas Jefferson in which he stated:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State . . . .

Id. at 164 (emphasis added).
On the one hand, our nation espouses a deeply-rooted commitment to education. Indeed, education has been declared the foundation of society. Consequently, it is no surprise that programs are adopted and funded in the hopes of ensuring that the citizenry develop sufficient mind and character to enable them to live and participate effectively in American democracy.

Juxtaposed against national goals regarding the education of our children is an equally important, fundamental principle that there shall be a “wall of separation” between church and state. Thus, conflicts arise between the goal of educating the citizenry and the desire to ensure that in so educating them the state does not aid religion. Given the enormous number of private, church-affiliated schools and society’s underlying desire to educate all children, it is not surprising that requests are made to use the public coffers to educate children enrolled in parochial schools.

In response to such requests, there have been publicly-funded programs to provide parochial schools, their enrollees, or the parents of such children with transportation, school books, special education, food, personal income tax deductions, property tax deductions, and a host of other programs. At the risk of over-simplifying, to judge each program a balance must be struck between ensuring that children are educated and prohibiting the state from aiding religion.


6. Reynolds, 98 U.S. at 145.

7. In California there are an estimated 2,064 religiously-affiliated private schools. Enrollment and Staff in California Private Elementary Schools and High Schools, California Dep’t. of Educ. 1982-83. It is estimated that 88.4% of eligible school children attend public schools, which leaves approximately 11.6% attending private schools. Enrollment Data, California Dep’t. of Educ. 1982-83. The national attendance of elementary and secondary school children in private sectarian schools is currently 11%. National Center for Educational Statistics, Digest of Educational Statistics 49 (1981).

8. For an excellent discussion of the history of demands by private schools for public funds, see Gabel, Public Funds for Church and Private Schools (1937). See also Note, Catholic Schools and Public Money, 50 Yale L.J. 917 (1940-41).

As the United States Supreme Court stated, in reference to such a balance:

[O]ur decisions have tended to avoid categorized imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case . . . between the courts and the states—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth . . . .

Although, undoubtedly, the California Legislature enacted section 37113 with the intention of providing education to the youth of this state, the provisions of the statute are nevertheless in violation of the California Constitution.

Part I of this comment discusses the history and provisions of section 37113. Part II discusses the California Supreme Court’s current approach to analyzing state aid to parochial schools under the California Constitution. Finally, Part III proposes that section 37113 is unconstitutional based upon the application of the court’s analytical approach.

II. HISTORY AND PROVISIONS OF SECTION 37113

A. History

The provisions of section 37113 became law as a part of a bill (A.B. 2590) that added three new sections to the Education Code which were specifically directed at aiding nonpublic students.12

10. Committee for Public Educ. v. Regan, 444 U.S. 646, 662 (1980). The Court held that the use of public funds to reimburse church-sponsored and secular nonpublic schools for preparing various testing and reporting services, mandated by state law, did not violate the establishment clause. Id. at 660-61.

11. The legislation that contained the provisions of what is now § 37113 declared that the purpose of the legislation was “to promote the intellectual and scientific growth . . . of all citizens.” A.B. 2590, Reg. Sess. (1971).

12. Id. The three new sections provided:

Section 5665.

The governing board of every district maintaining a high school shall, subject to space being available, admit pupils regularly enrolled in nonpublic schools to enroll in vocational and shop classes and in classes relating to the natural and physical sciences.

The attendance for each pupil so enrolled shall be credited to the district on the same proportion as the number of minutes of the pupil’s attendance bears to the minimum school day.

The attendance of such pupils shall be computed by dividing the total number of minutes of actual attendance by 240. Such attendance shall be included in the computation of apportionments to the district from the State
One of the three sections added by A.B. 2590 related to the loaning of public textbooks to students attending private schools.\textsuperscript{18}

---

School Fund.

Section 9760.
The State Board of Education shall make available to pupils entitled to attend public elementary schools of the district, but in attendance at a school other than a public school under the provisions of Section 12154, basic textbooks, other textbooks, and supplementary textbooks, adopted by the board for use in the public elementary schools. No charge shall be made to any pupil for the use of such adopted basic textbooks, other textbooks, and supplementary textbooks.

Textbooks shall be made available pursuant to this section only to the same extent that textbooks are made available to students in attendance at public elementary schools.

Textbooks shall be made available for the use of nonpublic elementary school students after the nonpublic school certifies to the State Superintendent of Public Instruction that such textbooks are desired and will be used by the elementary students.

Section 10310.
The Superintendent of Public Instruction shall make available to pupils entitled to attend the public schools of California, but in attendance at a school other than a public school under the provisions of Section 12154, the items specified in Section 10301, without cost to the pupils or to the nonpublic school which they attend.


One proposal that would have provided complete state funding for the cost of sending children to parochial schools was A.B. 150 (1971), which passed the Assembly, but failed to receive enough votes to pass the Senate. See Final Assembly History 1971, p. 93. For a full discussion of A.B. 150, see Comment, \textit{The Use of Public Funds by Private School via Educational Vouchers: Some Constitutional Problems}, 3 PAC. L.J. 90 (1972). For a good discussion of the pros and cons of the voucher concept, see Davis, \textit{Education Vouchers: Boom or Blunder}, THE EDUCATION FORUM 163-67 (Winter 1983).

13. See supra note 12. Section 9760 was later amended into § 60315 by A.B. 763, Reg. Sess. (1978). Section 60315 now provides as follows:

The Superintendent of Public Instruction shall lend to pupils entitled to attend the public elementary schools of the district, but in attendance at a school other than a public school under the provisions of Section 48222, the following items adopted by the state board for use in the public elementary schools:

(a) Textbooks and textbook substitutes for pupil use.

(b) Educational materials for pupil use.

(c) Tests for pupil use.

(d) Instructional materials systems for pupil use.

(e) Instructional materials sets for pupil use.

No charge shall be made to any pupil for the use of such adopted materials.

Items shall be loaned pursuant to this section only after, and to the same extent that, items are made available to students in attendance in public elementary schools. However, no cash allotment may be made to any nonpublic school.

Items shall be loaned for the use of nonpublic elementary school students after the nonpublic school student certifies to the State Superintendent of Public Instruction that such items are desired and will be used in a nonpublic elemen-
This section has been declared unconstitutional. A second section added by A.B. 2590, permitting nonpublic students to borrow specialized public textbooks and equipment used by visually handicapped students, has not been subject to suit.

The last of the three sections added by A.B. 2590, section 37113, (formerly section 5565), is the subject of this comment.

B. Provisions

Section 37113 specifically provides that, subject to space being available, "pupils regularly enrolled in nonpublic schools" are permitted to enroll in public "vocational and shop classes and in classes relating to the natural and physical sciences." Further, the section permits nonpublic students enrolled in public schools pursuant thereto, to be included in the school district's calculations when determining the amount of funds to be recovered by the district through the State School Fund. Thus, for every nonpublic student enrolled in one of the allowed public classes, the district will receive a state appropriation based upon the specified calculation.

III. Current Court Analysis Used to Assess the Constitutionality of State Aid to Parochial Schools

In deciding whether a California statute that concerns aid to nonpublic schools violates the doctrine of separation of church and state, the California Supreme Court has stated that "it is not the meaning of the First Amendment [of the United States Constitution] which is critical to our determination, but section 8 of article IX and section 5 of article XVI of the California Constitution."
Article IX, section 8 of the California Constitution prohibits the appropriation of public money for the support of sectarian schools which are not under the jurisdiction of officers of the public schools. Article XVI, section 5 forbids the state from granting "anything to or in aid of" any church or giving "help to support" any school controlled by a church or sectarian denomination.

These two sections differ from article I, section 4 of the California Constitution, which has language almost identical to the federal establishment clause. When applying article I, section 4 of the California Constitution, the court has found that the "same standards which the United States Supreme Court employs in applying the

Public Funds for Sectarian Schools, 60 HARV. L. REV. 793 (1946-47). The author states that the "chief hurdle to an appropriation of state funds will continue to be the express state constitutional prohibitions." Id. at 800. See also Stumberg, State Supervision of Education and the Fourteenth Amendment, 4 TEX. L. REV. 93 (1925).

21. Article IX, § 8 of the California Constitution provides: "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools . . . ." CAL. CONST. art. IX, § 8.

22. Article XVI, § 5 states:
Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever . . . .
CAL. CONST. art. XVI, § 5. The prohibitions found in § 8 of article IX and § 5 of article XVI are applicable in reviewing the constitutionality of § 37113 because the funds allocated pursuant to § 37113, see supra note 1, "help to support" sectarian schools. See infra notes 63-73 and accompanying text.

In addition to the prohibitions from aiding parochial schools, the California Constitution, article XVI, § 3, prohibits the granting of public money to aid private institutions and article XVI, § 6 prohibits loans and gifts to such organizations. However, in interpreting these sections the court has found that when the funds are for a public purpose they do not fall within the classification of a gift for private benefit. County of Alameda v. Janssen, 16 Cal. 2d 276, 281, 106 P.2d 11, 14, (1940). The court has interpreted public purpose broadly and is thereby likely, in the instant case, to find the aiding of private, sectarian schools, pursuant to § 37113, as being within the general public purpose of educating our citizens. County of Alameda v. Carleson, 5 Cal. 3d 739, 488 P.2d 953, 964, 97 Cal. Rptr. 385, 396 (1971); see also County of Los Angeles v. La Fuente, 20 Cal. 2d 870, 876-77, 129 P.2d 378, 382 (1942).

23. Article I, § 4 of the California Constitution provides:
Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion . . . .
federal language” should be used. However, when applying the more restrictive language contained in section 8 of article IX and section 5 of article XVI of the California Constitution, the court has chosen not to follow the standards used by the United States Supreme Court in interpreting the establishment clauses. Rather,

24. Mandel v. Hodges, 54 Cal. App. 3d 596, 616, 127 Cal. Rptr. 244, 257 (1976) (emphasis added). See also Board of Trustees of the Leland Stanford Junior Univ. v. Cory, 79 Cal. App. 3d 661, 145 Cal. Rptr. 136 (1978) (the court concluded that by adopting article IX, § 8, and article XVI, § 5, the people of California intended to make it clear that the state was not to support nonpublic school or religiously-affiliated schools). Id. at 665, 145 Cal. Rptr. at 138.

25. See supra notes 21 and 22.

26. When a statute is challenged under the federal establishment clause, the U. S. Supreme Court has stated that a three-part test must be applied:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster “an excessive entanglement with religion.” Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)). It should be noted that this could be the Term in which the U. S. Supreme Court revamps the test and/or the approach to be applied under the federal Constitution in matters concerning government support of religion. The first evidence of a possible shift in the Court’s emphasis came this year when the Court ruled that a town could own and publicly display a creche without violating the first amendment. Lynch v. Donnelly, 104 S. Ct. 1355 (1984). The shift of the Court is highlighted by Chief Justice Burger’s majority opinion in which he stated that the Constitution does not “require complete separation of church and state . . . it affirmatively mandates accommodations, not merely tolerance, of all religions, and forbids hostility toward any.” Id. at 1359.

Further evidence of a possible change in the Court’s approach is the Court’s granting certiorari in five cases in which the circuit courts found unconstitutional various state actions involving aid to religion. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983), cert. granted, School Dist. of the City of Grand Rapids v. Ball, 52 U.S.L.W. 3631 (circuit court held improper the renting of space in parochial schools for the purpose of providing teachers space in which to conduct classes); Wallace v. Jaffree, 705 F.2d 1526 (11th Cir. 1983), cert. granted, 52 U.S.L.W. 3719 (circuit court held invalid state-provided moment of silence); McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), cert. granted, Board of Trustees, Village of Scaresdale v. McCreary, 53 U.S.L.W. 3289 (circuit court held that it was improper for citizen group to display creche in public park); Agular v. Felton, 739 F.2d 48 (2d Cir. 1984), cert. granted, 53 U.S.L.W. 3269 (circuit court held improper state providing teachers for disadvantaged children attending religious schools); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), cert. granted, 53 U.S.L.W. 3597 (circuit court held improper voluntary student bible study club held during school hours).

Notwithstanding a possible relaxation of the federal doctrine separating church and state, the California Supreme Court has continued to strictly apply the provisions of the California Constitution requiring separation of church and state. For example, in Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 567 (1978), the court, based on the California Constitution, held unconstitutional the practice by the city of arranging the window blinds, or illuminating the windows of the city hall tower in the form of a cross on Christmas Eve, Christmas, and Easter.

Thus, although the display of a much more religious object, a creche, was held valid under the U.S. Constitution in Lynch, 104 S. Ct. at 1355, the California Supreme Court has
the court has stated that a two-pronged inquiry must be made: first, whether the challenged statute provides only "indirect benefits" to parochial schools and second, whether the character of these benefits is such that they result in the support of any sectarian school.  

Although, as noted above, no California cases have decided the specific issue of funding regularly enrolled nonpublic students to attend public school classes, three court decisions bear significantly on this issue because they address the question of public aid to parochial schools under section 8 of article IX and section 5 of article XVI of the California Constitution.

concluded that the California Constitution does not permit state-sponsored displays of religious objects. See also Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977) (upholding the refusal by the school district to permit a voluntary student bible study club to conduct its meetings on the school campus during the school day).

27. California Teachers Ass'n v. Riles, 29 Cal. 3d at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309. This comment does not involve a comparison between the federal three-part test and the state's two-part test, nor does it discuss whether § 37113 would be unconstitutional under the federal Constitution. However, the court's analysis in Riles involves many of the underlying theories that have been used to adjudicate the validity of state aid to parochial schools under the federal Constitution. Comment, California Teachers Association v. Riles: Textbook Loan to Sectarian Schools, 70 CALIF. L. REV. 959, 964 (1982).

28. Another major case that reviewed article IX, § 8 and article XVI, § 5, concerned the constitutionality of the state tax exemption for property used by nonprofit religious organizations for school purposes. Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1 (1956), appeal dismissed sub nom., Heisey v. County of Alameda, 352 U.S. 921 (1956). In Lundberg, a 4-3 decision, the court, although mentioning article IX, § 8 and article XVI, § 5, relied upon §§ 3, 4, and 5 of article XIII in finding the property tax exemption constitutional. These provisions were interpreted by the Lundberg court as implicitly authorizing an exemption from property taxes for property that is used by nonprofit religiously-affiliated schools. Id. at 653-54, 298 P.2d at 7-8. Accordingly, Lundberg is distinguishable from § 37113 in that there is no specific constitutional provision authorizing nonpublic school children to enroll in public classes.

Furthermore, special note should be made of the dissent in Lundberg, wherein Justice Schauer concluded that the welfare tax exemption relied upon by the majority was inapplicable to primary and secondary religiously-affiliated schools. Id. at 658, 298 P.2d at 8-19 (Schauer, J., dissenting). In reaching this conclusion, Justice Schauer relied upon three factors. First, the original language of article XIII, § 1(c), now article XIII, § 4(b), as submitted to the legislature, made specific reference to education. However, the reference to education was subsequently deleted. Second, the proponents of the addition of the welfare tax exemption specifically stated in the voters' pamphlet that private schools other than colleges would not be included within the exemption. Lastly, Justice Schauer pointed to the fact that attempts to amend the welfare tax exemption so as to include education were defeated by the voters both in 1926 and in 1933. Id. at 655-58, 298 P.2d at 8-10 (Schauer, J., dissenting). Justice Schauer's conclusion is bolstered by the fact that although the public welfare exemption has been expanded subsequent to the Lundberg decision, there still is no reference to education within the text of the constitutional exemption. See CAL. CONST. art. XIII, § 4(b). See also Korbel, Do the Federal Income Tax Laws Involve an "Establishment of Religion?", 53 A.B.A. J. 1018 (1967). See 63 Op. Cal. Atty Gen. 69, 85 (1980), for an interesting decision that neither a sales tax, nor a use tax may be constitutionally imposed upon textbooks or other educational materials sold by church-affiliated schools to their students.
In 1946, the Fourth District Court of Appeal concluded in *Bowker v Baker* that a California statute authorizing the transportation of parochial school pupils in public buses did not violate the California Constitution. In concluding that section 8 of article IX and section 5 of article XVI were not violated, the court found that when the enactment is lawful and only an "incidental or immaterial benefit" accrues to the parochial school, the benefit alone will not defeat the legislation. In deciding that the busing program was lawful, the court relied upon both the broad police power of the state to promote the education, welfare and safety of its citizens, and also the mandate found in article IX, section 1 of the California Constitution that the legislature has a duty to encourage the promotion of intellectual improvement. The court found that the purpose of the busing program was lawful because of the state's broad police power and the state's duty to encourage intellectual improvement. The court further determined that the children received the direct benefit of the program, and that the parochial school itself received

30. *Id.* at 667, 167 P.2d at 263. For a similar result under the U.S. Constitution, see Everson v. Board of Educ., 330 U.S. 1 (1947). But see 41 A.L.R. 3d 344, 361-63 (1972) (discussing state statutes declared unconstitutional for allowing public school buses to transport private school children).

In 1941, when S.B. 568 (a bill which added § 1.92 of the School Code, now § 39808 of the Education Code which permits the transportation of children to private schools in public buses) was debated then Cal. Attorney General, Earl Warren, stated in a letter recorded in the Senate Journal that:

>The prohibition in our State Constitution against the use of public moneys generally and of school moneys in particular for other than public purposes are both broad and inclusive and have been strictly construed by the courts of our State [therefore] I am of the opinion that the weight of authority . . . is against the validity of statutes such as Senate Bill No. 568.

31. Article XVI, § 5 was article IV, § 30 at the time *Bowker* was decided. CAL. CONST. art. IV, § 30.
33. *Id.* at 666-77, 167 P.2d at 263. For a general discussion of the state's police power, see 5 WITKIN, SUMMARY OF CALIFORNIA LAW 3734-3824 (1974). See also Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 694, 151 P. 398, 401 (1915) (holding that under the police power "the state may 'prescribe regulations promoting the health, peace, morals, education, and good order of the people . . . .'") (quoting State v. Clausen, 65 Wash. 156, 177, 117 P. 1101 (1911)).
34. Article IX, § 1 of the California Constitution entitled *Encouragement of Education*, provides:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.

CAL. CONST. art. IV, § 1.
only incidental benefits.\textsuperscript{35} 

In \textit{California Education Facilities Authority v. Priest},\textsuperscript{36} the court found constitutional a statute that provided low-interest financing for private colleges through the creation of a public agency.\textsuperscript{37} As in \textit{Bowker}, the \textit{Priest} court relied upon the legislative duty to encourage, by all suitable means, the promotion of intellectual improvement.\textsuperscript{38} The court found that, although the special financing program provided some form of benefit to parochial schools by way of the lower rate of interest, such benefit was incidental to the primary public purpose of promoting education by improving and maintaining educational facilities.\textsuperscript{39} Consequently, the court determined that providing low-cost financing to religiously-affiliated private colleges did not violate the state constitution.

In the last of the three cases, \textit{California Teachers Association v. Riles},\textsuperscript{40} the court held that a state program allowing public textbooks to be loaned without charge to educational institutions with religious affiliations violated section 8 of article IX and section 5 of article XVI of the California Constitution.\textsuperscript{41}

In the \textit{Riles} decision, the court articulated the two-pronged inquiry mentioned earlier.\textsuperscript{42} In applying the first prong—whether the
parochial school receives only indirect benefit—the court concluded that although the child received the textbooks, the parochial school nevertheless directly benefited from the loan program. In deciding that the parochial schools received more than an indirect benefit from the book loan program, the Riles court reasoned that the benefits accruing to the students and the parochial schools were inseparable. Consequently, the court found it impossible to characterize the "advantage to one as remote and to the other as direct." In reaching this conclusion, the court rejected the child-benefit theory. Under this theory, if the state support goes directly to the child, it is deemed to have only an indirect benefit to the parochial school and, therefore, does not violate the constitution. Unfortu-

43. 29 Cal. 3d at 810-11, 632 P.2d at 963, 176 Cal. Rptr. at 309-10. See also supra notes 29-35 and accompanying text.

44. Riles, 29 Cal. 3d at 810, 632 P.2d at 962, 176 Cal. Rptr. at 309.

45. Id. at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309. The court stated: "[I]f the fact that a child is aided by an expenditure of public money insulates a statute from challenge, constitutional proscriptions on state aid to sectarian schools would be virtually eradicated." Id. at 807, 639 P.2d at 960, 167 Cal. Rptr. at 307. Although the U.S. Supreme Court has not gone so far as to discard the child-benefit theory, the Court has indicated the theory is somewhat limited. In Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1972), the Court stated whether the benefit goes to the child as opposed to the school is only one among many considerations. Id. at 781.

Further, in Wolman v. Walter, 433 U.S. 229 (1977), the Court rejected an Ohio statute which was drafted by the Legislature such that instructionally-related materials purchased by the state would be given directly to the nonpublic student. As such, the statute would thereby fall within the child-benefit doctrine which had earlier been approved by the Court in Everson v. Board of Educ., 330 U.S. at 250-51, and Board of Educ. v. Allen, 392 U.S. 236 (1968). The statute authorized the state to provide instructional materials directly to nonpublic school students, rather than to the public school. In rejecting the Ohio statute, the Wolman Court recognized the tension it had created between its decision and that of Everson and Allen. 433 U.S. at 251-52 n.18. Speaking directly of the Allen decision, the Wolman Court stated that Allen would remain law as a matter of "stare decisis." Id. However, the Court stated that faced "with a choice between extension of the unique presumption [of neutrality] created in Allen and continued adherence to the principles announced in our subsequent cases, we choose the latter cases." Id. See generally Comment, supra note 27, at 966-67. For a critique of the Wolman decision, see Note, Limitation of Permissible State Aid to Church-Related Schools Under the Establishment Clauses: Wolman v. Walter, 5 Pepperdine L. Rev. 573 (1978).

Subsequent to the Wolman decision, the Supreme Court decided Mueller v. Allen, 103 S. Ct. 3062 (1983). The Mueller Court found very persuasive the fact that the aid to parochial schools was available only as a result of the decisions of individual parents. Id. at 3069. Consequently, it would appear that, unlike the California Supreme Court, the United States Supreme Court would still hold that who requests the state aid is critical in determining whether there has been a violation of the Constitution.

nately, in rejecting the child-benefit theory, the court gave little indication as to how far the inseparability notion extends. One author has suggested that the concept of inseparability is applicable to all forms of public aid to parochial schools. It is difficult to accept such a conclusion, however, in light of the Riles court's discussion of the Priest case.

As mentioned earlier, the Priest court upheld the creation of a public agency authorized to issue tax-exempt bonds, the proceeds of which were to be used by private institutions of higher education. The Riles court concluded that the Priest decision was not inconsistent with the Riles holding. In so concluding, the court stated that Priest was distinguishable because it "did not involve the expenditure of public funds for the support of sectarian schools."

The court's conclusion that Priest did not involve the expenditure of public funds was based on a finding that "no financial burden was imposed on the state" by the creation of a public agency authorized to issue tax-exempt bonds. As explained by the Priest court, there was "no expenditure of public funds, either by grant or loan, no reimbursement by [the] State for expenditures made by a parochial school or college, and no extending or Committing of [the]...

(author describes and critiques child-benefit theory). On facts similar to Riles, the U.S. Supreme Court ruled that loaning books to nonpublic students did not violate the U.S. Constitution. Allen, 392 U.S. at 248. The Riles court, however, found unpersuasive the Allen Court's reliance on the child-benefit theory and the theory that the books were to be used only for secular purposes. 29 Cal. 3d at 812, 632 P.2d at 963-64, 176 Cal. Rptr. at 310-11. The distinction between the two rulings is important not only because of the different analyses used, but also because it reinforces the notion that the prohibitions contained in the California Constitution concerning the separation between church and state are more restrictive than the U.S. Constitution with regard to using state aid for parochial schools. For a discussion criticizing the Allen decision, see Noie, 82 HARV. L. REV. 172 (1968-69). "The distinction between benefits to the child and benefits to the school, however, seem more conceptual than real." Id. at 175-76. See also Freund, Public Aid to Parochial Schools, 82 HARV. L. REV. 1680 (1968-69) (suggesting that the Supreme Court should constrict the future operation of Allen).

47. Comment, supra note 27, at 973 n.85.
48. Id. The author concludes that because the concept of inseparability could easily include all forms of state aid, the first prong of the Riles analysis has little meaning. As a consequence, the author argues, it is the second prong—whether the government aid supports the educational function of the sectarian school—that is pivotal to determining whether the provision of state aid is in violation of the California Constitution. Id.
49. Riles, 29 Cal. 3d at 805-07, 813 n.16, 632 P.2d at 959-960, 964 n.16, 176 Cal. Rptr. at 306-07, 311 n.16.
50. See supra notes 36-39 and accompanying text.
51. 29 Cal. 3d at 813 n.16, 632 P.2d at 964 n.16, 176 Cal. Rptr. at 311 n.16. For a discussion of the other grounds on which the Riles court distinguished Priest, see infra note 96.
52. Riles, 29 Cal. 3d at 806, 632 P.2d at 960, 176 Cal. Rptr. at 307 (paraphrasing Priest, 12 Cal. 3d at 606, 526 P.2d at 521, 116 Cal. Rptr. at 369).
State's credit." Thus, the Priest court found that any benefit received by the church-affiliated colleges as a result of the tax-exempt bonds was incidental.

Similarly, in Bowker v. Baker, the court found that although nonpublic students were allowed to be transported on public school buses, the routes of the buses were neither changed nor extended, nor were any additional stops made to accommodate the private school children. Consequently, the court concluded that the only possible state expense was the "small additional cost caused by the added weight in the buses," and this "incidental benefit alone" would not defeat the statute.

Unlike Priest and Bowker, Riles involved a direct appropriation. Thus, although it is difficult to discern from the Riles decision exactly what constitutes a direct as opposed to an indirect benefit, at a minimum, the Riles decision suggests that a state appropriation that benefits both the student and the parochial school is neither indirect nor remote.

Regarding the second prong of the inquiry articulated in Riles—whether the character of the benefit is such that it results in the support of the sectarian school—the court stated that if the character of the state program has "doctrinal content," it violates the California Constitution. In describing state aid that involves doctrinal content, the court referred to instances in which the benefit "serves to advance the essential objective of the sectarian school, which is the education of the child." The Riles court distinguished public aid for programs having doctrinal content from public aid for

---

53. Priest, 12 Cal. 3d at 603, 526 P.2d at 520, 116 Cal. Rptr. at 368 (quoting Hunt v. McNair, 413 U.S. 734, 745 n.7 (1973)) (a South Carolina state statute, identical in all pertinent respects to the California statute in Priest, was upheld under the U.S. Constitution).
54. Priest, 12 Cal. 3d at 605, 526 P.2d at 521, 116 Cal. Rptr. at 369.
56. Id. at 656, 167 P.2d at 257.
57. Id. at 656-57, 167 P.2d at 257-58.
58. Id. at 663, 167 P.2d at 261.
59. See Riles, 29 Cal. 3d at 796-97 n.1, 632 P.2d at 953-54 n.1, 176 Cal. Rptr. at 300-01 n.1 (quoting text of CAL. EDUC. CODE § 60246 in effect at that time). As with the book loan program, § 37113 appears to be implemented almost entirely "between officials of the nonpublic school, on the one hand, and officers of the State, on the other." Riles, 29 Cal. 3d at 810, 632 P.2d at 962, 176 Cal. Rptr. at 309 (quoting Meek v. Pittenger, 421 U.S. 349, 379 (1975) (Brennan, J., dissenting)). Because § 37113 does not require school district reporting, see supra note 3, it is difficult to determine each school district's procedure used relative to the statute. However, in Los Angeles, for example, the transaction takes place between the administrator of the nonpublic school and the administrator of the public school.
60. Riles, 29 Cal. 3d at 811-12, 632 P.2d at 963, 176 Cal. Rptr. at 310.
61. Id.
programs providing generalized government services. The court concluded that whereas aid received by parochial school through generalized government service programs, such as fire, police and maintenance of roads, is permissible, aid received by parochial schools through doctrinal content programs is impermissible.62

Applying this distinction, the Riles court reasoned that textbooks have a central place in "the educational mission of a school" and, therefore, providing textbooks at public expense to nonpublic students "appropriates money to advance the educational function of the [parochial] school," in violation of the California Constitution.

IV. APPLICATION OF THE COURT'S ANALYTICAL APPROACH TO SECTION 37113

A. Direct Aid

As noted above, in assessing the validity of a program, the first inquiry is whether the parochial school is only indirectly benefited.64

Although section 37113 is similar to the statute in Bowker in that its benefit is contingent upon space being available, this statute is more closely comparable to the Riles statute because it provides a specific state appropriation.65 It is true that with regard to section 37113, the public money goes to the public school and not to the child. It would be inconsistent, however, to accept the Riles decision that a grant directly to the child is not automatically permissible and then to assert that the grant becomes automatically permissible simply because the recipient is the public school.66 The Riles court was unwilling to adhere to the principle that if the child directly receives public aid, the parochial school only indirectly receives the aid.67 Similarly, the fact that the public money goes directly to the public school should not in itself be determinative of whether the parochial school is receiving direct aid. In other words, the identity of the direct beneficiary of the state aid is not the critical factor in determin-

62. Id.
63. Id. at 811-13, 632 P.2d at 963, 176 Cal. Rptr. at 310-11.
64. See supra text accompanying note 27.
65. See supra note 1 and accompanying text.
66. Cf. Wolman v. Walter, 433 U.S. 229 (1977) (the U.S. Supreme Court stated that "[i]f a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better."). Id. at 251. Thus, the controlling factor in Wolman was not who actually received the state money, but rather whether the aid furthered a religious enterprise.
ing whether the parochial school is receiving state aid in violation of the constitution.\textsuperscript{68}

In \textit{Riles}, the court found that "books are a critical element in enabling the school to carry out its essential mission to teach the students," and accordingly held that "there is no rational reason for concluding that the school benefits only indirectly or remotely from the loan if the child is the nominal recipient."\textsuperscript{69} Section 37113 is analogous to the \textit{Riles} statute\textsuperscript{70}—vocational and science classes are critical elements in a child's education.\textsuperscript{71} Therefore, the mere fact that the public school and/or the child is the "nominal recipient" of the aid does not mean that the parochial school is only indirectly or remotely benefited.\textsuperscript{72}

For each nonpublic student who attends an allowed public class under section 37113, the parochial school is relieved from providing that class for the student. Furthermore, it is the direct application of state funds which absolves the parochial school's responsibility for providing the class to a particular student.

As the \textit{Riles} court stated, there is no "significant distinction from a constitutional standpoint whether [the books] are loaned to the students for use in the school, or to the school for use by the students. In either circumstance, both the child and the school benefit."\textsuperscript{73} Section 37113 similarly aids both the student and the parochial school. While the child is undoubtedly helped by the statute, the parochial school also directly benefits. Unlike \textit{Priest} and \textit{Bowker}, which did not involve state appropriations, section 37113 specifically provides for the use of state money with the direct result that the parochial school is relieved from providing classroom space, teachers, and support materials for the pupils.

\textsuperscript{68} As one author aptly stated, the "difference . . . does not lie in the identity of the beneficiary but in the way in which the aid is extended." Cushman, \textit{supra} note 46, at 348.
\textsuperscript{69} \textit{Riles}, 29 Cal. 3d at 810, 632 P.2d at 963, 176 Cal. Rptr. at 310.
\textsuperscript{70} \textit{See supra} notes 12-13.
\textsuperscript{71} \textit{See infra} note 78.
\textsuperscript{72} Unlike the statutes discussed in \textit{Priest} and \textit{Bowker}, § 37113 provides for an expenditure of state funds. \textit{See supra}, note 1. In \textit{Priest}, the court determined that the better interest rate bonds were the obligation of the newly-created agency and not a debt of the state, and further that the administrative costs of the agency were being borne by the participating colleges. Consequently, there was no expenditure of public money. 12 Cal. 3d at 597, 526 P.2d at 515, 116 Cal. Rptr. at 363. In \textit{Bowker}, the court found that the nonpublic students simply filled empty seats on the public buses and, thus, no allocation of state funds was made to accommodate the nonpublic students. \textit{Bowker}, 73 Cal. App. 2d at 656, 167 P.2d at 257.

While it is true that the benefit of § 37113, as in \textit{Bowker}, is only available subject to space, \textit{see supra} note 1, § 37113 differs from \textit{Bowker} in that a specific allocation of state funds is made for those nonpublic students who fill the spaces that are available. \textit{See supra} note 1.
\textsuperscript{73} 29 Cal. 3d at 810, 632 P.2d at 962-63, 175 Cal. Rptr. at 309.
B. **Character of the Benefit**

Even if under the first prong of the court's analysis in *Riles* it is determined that the benefit to religious schools provided by section 37113 is neither indirect nor remote, the second part of the two-prong analysis\(^74\) must be applied to determine the constitutionality of the statute. As applied to section 37113, the question under this second part of the analysis is whether the benefit provided by the statute is such that it results in the "support of any . . . sectarian school."\(^75\)

As noted above, in deciding whether a state program supports sectarian schools, the *Riles* court distinguished between doctrinal content programs and generalized government service programs.\(^76\) Whereas the latter type of program was held to be valid, the former type of program was found to violate the California Constitution.\(^77\)

Because the distinction between doctrinal content and generalized government service programs is crucial to the evaluation of the constitutionality of a statute, it is necessary to determine within which of the two program categories section 37113 falls.

As with the textbook loan program involved in *Riles*, section 37113 directly concerns the education of children. Vocational and science classes are part of the basic curriculum of a school\(^78\) and are unlike general government services, which the *Riles* court referred to

\(^74\) Id.
\(^75\) See supra notes 60-63 and accompanying text.
\(^76\) Id.
\(^77\) Id.
\(^78\) In regard to science classes, § 51225 of the California Education Code requires that in order to graduate from high school, a student must complete a course of study in science. \textit{CAL. EDUC. CODE} § 51225 (West 1978). Furthermore, § 51225.3 of the California Education Code, which was enacted in 1983, to become effective in the 1986-87 school year, requires students to take two courses in science prior to graduation. \textit{CAL. EDUC. CODE} § 51225.3 (West Supp. 1985).

Although vocational education classes are not required for high school graduation, \textit{(see CAL. EDUC. CODE} §§ 51225 and 51225.3), they are integral to the school curriculum. Indeed, an estimated 80% of the school districts in California offer some form of vocational education. \textit{DEPT. OF EDUC., CALIFORNIA BASIC EDUCATIONAL-DATA SYSTEM} 1981-82. Further, the legislature has recognized the importance of vocational education. In § 52300 of the Education Code, entitled \textit{Vocational Education}, the Legislature has declared that vocational classes "will serve the state and national interests . . . to prepare students for an increasingly technological society . . . ." \textit{CAL. EDUC. CODE} § 52300 (West 1978). \textit{See also} S.B. 178, Ch. 1234 (1983). In enacting S. B. 178, the Legislature created the State Occupational Information Coordinating Committee, which is directed to develop a statewide comprehensive labor market and occupational supply and demand information system. Among the current state programs to be included in the development of the statewide plan are vocational education programs. \textit{See CALIFORNIA LEGISLATURE SUMMARY DIGEST} 454-55 (1983-1984).
as fire, police and maintenance of roads. Thus, providing such classes to nonpublic students at public expense helps to "advance the essential objective of the sectarian school, which is the education of the child."

Furthermore, referring to the Bowker decision, which upheld the transportation of parochial students in public school buses, the Riles court concluded that providing such transportation was "analogous to the provision of generalized governmental services such as police and fire protection."

Vocational and science classes are distinguishable from generalized governmental services. Whereas services such as transportation have little to do with the purpose of a school, vocational and science classes do constitute a part of the education a child receives. Therefore, section 37113 falls within the doctrinal content category as defined by the Riles court.

Notwithstanding the conclusion that vocational and science classes fall within the prohibited sphere of "doctrinal content," it can be argued that providing state aid for these classes, even if it accrues to sectarian schools, does not violate the separation of church and state doctrine because the classes involve secular subject matter. This

---

79. 29 Cal. 3d at 811-12, 632 P.2d at 963, 176 Cal. Rptr. at 310.
80. See supra note 78 and accompanying text. It has also been contended that because parents who send their children to parochial school still have to pay taxes which support the public school, they should be entitled to some form of relief. L. PFEFFER, CHURCH STATE AND FREEDOM 579 (1953). Arguably, allowing parochial children to attend public classes would be one form of such relief. However, the premise that relief is due to parents of children attending parochial school is incorrect.

The tax structure of a state is not based on individual usage. Rather, each member of society pays taxes which the government then spends on the goods, goals and services which the society, through its elected officials, has chosen as most desirable. Consider, for example, that although everyone does not use the freeways, those who don't are not permitted to deduct from their taxes that portion which goes toward building and maintaining the freeways. Similarly, parents who choose not to send their children to public schools should not be allowed to deduct, or to receive a form of tax relief, from their taxes for that portion which is used to support the public schools.

81. Riles, 29 Cal. 3d at 812, 632 P.2d at 963, 176 Cal. Rptr. at 310.
82. See supra note 35 and accompanying text.
83. 29 Cal. 3d at 813 n.16, 632 P.2d at 964 n.16, 176 Cal. Rptr. at 311 n.16.
84. See supra note 78 and accompanying text.
85. The first part of the federal three-part test inquires whether the statute has a secular purpose. See supra note 26. Accordingly, the argument is made that if the legislation relates only to a secular purpose, no constitutional violation occurs. See Priest, 12 Cal. 3d at 606, 526 P.2d at 521-22, 116 Cal. Rptr. at 369-70.

However, both Pope Pius XI and Pope Leo XIII were quoted, in reference to Catholic schools, as ordering that "every . . . subject taught, be permeated with Christian piety." Konvitz, Separation of Church and State: The First Freedom, 14 LAW AND CONTEMP. PROBS. 44, 58 (1949) (emphasis omitted). Similarly, the Lutheran school manual demands "that all
contention is supported by two related propositions. The first proposition holds that if the parochial school fulfills the state's educational obligation, it is constitutionally permissible to compensate the parochial school for doing that which the state would otherwise do. The second proposition holds that if the statute was enacted for a valid government purpose, the state should be permitted to accomplish the statute's purpose.

To apply the first proposition would be exalting form over substance. While it is true that there is nothing that prohibits a state from providing an education to its citizens, there is a prohibition against the state providing aid to sectarian schools. Thus, even though the parochial school may be doing that which the state would otherwise do, if in so doing the parochial school receives state aid, the rendering of such aid may still be in violation of the constitution.

Consequently, the argument that because a state has taken on the responsibility of educating its children that it is therefore constitutional for a sectarian school to be compensated for similarly educating children, fails to address the underlying issue—namely, whether the type of aid violates the prohibitions against state aid for parochial schools. Under this analysis, the granting of public aid to sectarian schools is not justified by the first proposition.


86. In California, the Supreme Court has ruled that education is a fundamental right. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). See also San Antonio Independent School Dist. v. Rodrigues, 409 U.S. 822 (1972) (Marshall, J., dissenting) (Justice Marshall argued that education was a fundamental right under the U.S. Constitution).

87. The argument is founded in part on Pierce v. Soc'y Sisters Order, 268 U.S. 510 (1925), in which the Court ruled that children have a right to attend parochial schools. Id. at 514. Thus, it has been contended that if a child has a right to attend parochial school instead of public school, there is nothing wrong with having the state pay for the cost of parochial school. L. PFEFFER, supra note 80, at 578.

88. Bouker, 73 Cal. App. 2d at 663, 167 P.2d at 261; Riles, 12 Cal. 3d at 606, 526 P.2d at 522, 116 Cal. Rptr. at 370.

89. See supra notes 21-22 and accompanying text. On a related matter, the U. S. Supreme Court ruled in Zorach v. Clauson, 343 U.S. 306 (1952), that it is constitutionally permissible to excuse children from part of their regular secular studies to participate in religious instruction at parochial schools. In light of this conclusion, one author has contended that it is "difficult to see how it would be unconstitutional to release them [students] to participate in secular instruction." L. PFEFFER, CHURCH STATE AND FREEDOM 578 (1973). However, releasing public students to attend religious classes involves no appropriation of funds; whereas, allowing parochial students to attend public classes, pursuant to § 37113, involves a direct state appropriation. See supra note 1 and accompanying text. See also Gordon v. Board of Educ. of City of Los Angeles, 78 Cal. App. 2d 404, 178 P.2d 488 (1947). For a general discussion of release time programs, see Cushman, Public Support of Religious Education in American Constitutional Law, 45 ILL. L. J. 333, 349 (1950-51).
The second proposition—that if the government is pursuing a valid purpose it should be permitted to accomplish its purpose—also fails to overcome the underlying prohibition against aid to parochial schools. Proponents of this second proposition, as it relates to the current issue, contend that the state has a valid interest in seeing that its citizens are educated, and therefore state aid given to achieve this goal is valid. More specifically, proponents of this argument point to article IX, section 1 of the California Constitution which imposes on the legislature a constitutional duty to "encourage by all suitable means the promotion of intellectual improvement."

Without mentioning article IX, section 1, however, the Riles court found that it "cannot agree that a benefit to the school in the form of a loan is justified because the books will be used only for secular instruction." Stating that section 8 of article IX and section 5 of article XVI of the California Constitution "do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction," the court concluded that providing textbooks, even if used only for secular purposes, violated the California Constitution.

Because the Riles court did not mention article IX, section 1, it is difficult to determine the current effect of the general constitutional mandate to encourage intellectual improvement when balanced against the constitutional prohibition against state aid for parochial schools. The fact that the Riles court did not mention article IX, section 1 suggests that the court holds these provisions inapplicable in cases in which the restrictive language of article IX, section 8 and article XVI, section 5 is applied. Such a conclusion may be incorrect, however, because the Riles court chose not to overrule the Bowker and Priest decisions, both of which relied upon the legislature's constitutional mandate to promote intellectual improvement.

---

90. See supra note 34.
91. Id.
92. 29 Cal. 3d at 812, 632 P.2d at 964, 176 Cal. Rptr. at 310-11.
93. Id. at 812, 623 P.2d at 964, 176 Cal. Rptr. at 311.
94. Alternatively, by failing to mention art. IX, § 1 as it relates to the textbook loan program, the Riles court may have concluded that that section of the constitution applies solely when the state aid is found to provide only an indirect benefit to the parochial school. This is supported by the fact that the Riles court chose not to overrule Bowker and Baker, two cases which relied upon art. IX, § 1, but which also found that the state aid was merely incidental to the legislation's main purpose.
95. 29 Cal. 3d at 813 n.16, 632 P.2d at 964 n.16, 176 Cal. Rptr. at 311 n.16.
96. Bowker, 73 Cal. App. 2d at 664-65, 167 P.2d at 261; Priest, 12 Cal. 3d. at 605-06, 526 P.2d at 521, 116 Cal. Rptr. at 369. In deciding that Bowker was consistent with Riles, the
Yet, even if the mandate to promote intellectual improvement were considered applicable to assessing the validity of state aid to parochial schools, this mandate would not be applicable in regard to section 37113 for the following two reasons. First, section 37113 is distinguishable from the statutes involved in Bowker and Priest. Although the Bowker and Priest courts based their opinions on the notion that the transportation program (Bowker) and the tax-free bond program (Priest) were enacted for the purpose of promoting intellectual improvement, the two courts found this purpose justifiable because the programs did not involve state appropriations, and thus made the benefit to the parochial schools merely incidental.97

As mentioned earlier, section 37113 involves a state appropriation, the benefit of which directly accrues to the parochial school.98 Consequently, unlike Bowker and Priest, section 37113 does not involve merely incidental benefits to the parochial schools.99 Accordingly, the mandate stated in article IX, section 1, as interpreted in Bowker and Priest, would not be applicable to section 37113.

Article IX, section 1 is inapplicable to section 37113 for a second reason—namely, that the effect of the latter statute is to advance religious studies. As George La Nove stated in speaking about share-time systems (wherein a child divides his school day between parochial and public schools):100 "[T]he need for parochial schools to de-

---

97. See supra note 1 and accompanying text.
98. Id.
99. See supra notes 64-73 and accompanying text.
100. For a complete discussion of the shared-time concept, see Hearing on H.R. 6074, Before the Ad Hoc Subcomm. on Study of Shared-Time Education of the House Comm. on Educ. and Labor, 88 Cong., 1st Sess. (1964). See also Choper, The Establishment Clause and Aid to Parochial Schools, 56 CALIF. L. REV. 260 (1968) (proposing that state aid to parochial schools should be permitted as long as the aid does not exceed the value of the secular educa-
velop teachers for the 'secular' subjects would decline [and] the parochial schools could then concentrate on the religious and humanistic subjects which they can teach best.'”

Thus, arguably, allowing a child to attend public vocational and science classes has the effect of permitting the sectarian schools to spend more money on religious subjects. Being fairly standard curriculum, these secular classes would likely be offered to the child with or without section 37113. Certainly the constitutional mandate to encourage intellectual improvement does not include the advancement of sectarian classes. If such were the case, the mandate would swallow the doctrine of separation of church and state as it relates to aid for parochial schools. In light of the fact that the potential effect of section 37113 may very well be the encouragement of additional concentration on religious studies rather than the advancement of intellectual improvement, any protection which article IX, section 1 may afford relative to the prohibitions in article IX, section 8 and article XVI, section 5 of the California Constitution would not

101. Hearing on H.R. 6074, supra note 100, at 233.

102. It should be noted that in an Attorney General’s Opinion, then Attorney General Stanley Mosk, replying to a request concerning the right of a nonpublic student to attend public classes, stated:

If a public school board determines to permit a student who is in full time attendance at a private school to attend one or more public classes, it is cautioned that such classes may not be established in order to provide instruction that the private school itself is required to provide by the provisions of section 12154. For to do so would in effect constitute providing public funds to support a school not under the exclusive control of the officers of the public schools in contravention of the provision of California Constitution article IX, section 8. 39 Op. Cal. Att’y Gen. 149, 153 (1962). Section 12154, noi § 48222 of the California Education Code, mandates that private school children be taught “in the several branches of study required to be taught in the public schools of the state.” Cal. Educ. Code § 48222 (West 1978). Section 51225 sets forth those classes which are required at public schools; one of which is science. Cal. Educ. Code § 51225 (West Supp. 1984). Accordingly, under Mosk’s view, because the private schools are required to teach science, that portion of § 37113 which allows parochial school children to attend public science classes would be in violation of the California Constitution.

103. See also supra notes 78 and 102.
be applicable to section 37113.

This determination that article IX, section 1 is inapplicable to section 37113, coupled with the earlier assessment that vocational and science classes contribute directly to the essential objective of the sectarian school (i.e., education of the child),\textsuperscript{104} requires a finding that under the second part of the \textit{Riles} two-prong test, section 37113 supports sectarian schools in violation of both article IV, section 8 and article XVI, section 5 of the California Constitution.

\section*{V. Conclusion}

The California Constitution, article IX, section 8 and article XVI, section 5 specifically prohibit the government from aiding parochial schools.\textsuperscript{105} The \textit{Riles} court concluded that a two-prong inquiry must be made to determine the constitutionality of a statute under these two constitutional provisions.\textsuperscript{106} If this inquiry finds that the state aid more than indirectly benefits parochial schools \textit{and} contributes to the teaching of children in parochial schools, then the allocation of the state aid is in violation of the constitution.

The \textit{Riles} court's two-prong inquiry approach is applicable to section 37113. This statute, because it relieves the parochial school from having to expend funds normally necessary to educate children in vocational and science classes, in effect provides more than indirect aid to the parochial school.

Implicit in the \textit{Riles} approach is the idea that in certain instances parochial schools can receive state aid without contravening the state constitution. In drawing the balance between state aid that is permissible and state aid that violates the constitution, however, the \textit{Riles} court refused to adhere to the child-benefit theory and instead chose to emphasize whether or not the state aid advances the essential objective of the parochial school—educating children.

As opposed to statutes authorizing general government services, section 37113 allocates funds to aid parochial schools in their primary purpose of educating children. In contrast to police or fire protection, or even bus transportation, the vocational and science classes provided for by section 37113 are exclusively parts of the school curriculum.

\begin{itemize}
  \item \textsuperscript{104} See \textit{supra} text accompanying notes 73-84.
  \item \textsuperscript{105} See \textit{supra} notes 21 and 22.
  \item \textsuperscript{106} It is interesting to note that one author argues that a literal construction of article IX, § 8 and article XVI, § 5 most accurately reflects the constitution's objective, and that the less literal two-prong approach of the \textit{Riles} court will allow parochial schools to receive some form of aid, which \textit{should} be impermissible. Comment, \textit{supra} note 27, at 965.
\end{itemize}
While it is true that the state has a responsibility to enhance intellectual improvement, such an obligation should not be interpreted so broadly as to render meaningless the doctrine of separation of church and state.

The California Supreme Court has attempted to strike a balance between the competing interests of the "intellectual improvement" mandate and the "separation of church and state" doctrine. Mindful of the state's desire to educate its citizenry, yet well aware of its own responsibility to uphold the California Constitution, the court set forth a two-prong inquiry. Applying this approach, an analysis of section 37113 finds that this statute more than indirectly benefits parochial schools and also aids such schools in their primary purpose of educating children. Hence, the statute falls within the prohibited spheres of the two-prong test articulated by the court. Accordingly, section 37113 should be declared to be in violation of the California Constitution.

William Klein