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NOTES AND COMMENT

TRANSPORTATION FOR CHILDREN ATTENDING PAROCHIAL SCHOOLS

The problem of the constitutionality of state statutes providing transportation for children attending parochial schools has recently been considered by the United States Supreme Court.¹ These statutes are challenged as violating the First and Fourteenth Amendments of the Federal Constitution.

There can be no doubt as to the purpose of the First Amendment² made applicable to the individual states by the Fourteenth Amendment.³ Its end is not to condemn religion, persecute those who practice it or favor those who do not; its only service is to prevent the establishment of a national religion whose hierarchy would be responsible to the civil authorities and to preclude the civil authorities from limiting in any way the lawful practice of a religious belief.⁴ Religion is favored by the public policy of the government and it is within the powers of the federal and state governments actively to encourage the practice of religion, provided no discrimination is exercised.⁵

To what extent the state or federal government may actively support religious institutions, particularly by the expenditure of public funds, is a question which is often difficult of determination. There is no doubt that a gift to a particular church or sect of public funds to be used solely in aid of the practice or propagation of the tenets of that church or sect would be violative of the restraint imposed by the First and Fourteenth Amendments. But the churches

¹ *Everson v. Board of Education*, — U. S. —, 91 L. ed. 472 (1947).

² U. S. CONST. AMEND. I; *Permoli v. First Municipality*, 3 How. 589, 11 L. ed. 739 (1845); *State v. Mockus*, 120 Me. 84, 113 Atl. 39 (1921); BLACK, CONSTITUTIONAL LAW (4th ed. 1927) § 204.

³ U. S. CONST. AMEND. XIV, § 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."; *Murdock v. Pennsylvania*, 319 U. S. 105, 87 L. ed. 1292 (1943); *Rase v. United States*, 129 F. (2d) 204 (C. C. A. 6th 1942); *Hamilton v. City of Montrose*, 109 Colo. 228, 124 P. (2d) 757 (1942); *ex parte Winnett*, 73 Okla. Cr. 332, 121 P. (2d) 312 (1942).

⁴ *Zollman, Religious Liberty in the American Law*, 17 MICH. L. REV. 355, 357 (1919).

⁵ "The constitutional provisions for liberty of conscience do not mean that religion shall not be encouraged by the state. In point of fact, it is not the encouragement of religion which is forbidden by the constitutions, but any such discrimination in that encouragement as may compel men to violate their consciences, in respect either to the choice of a mode of worship or the support of religious bodies by their contributions." BLACK, CONSTITUTIONAL LAW (4th ed. 1927) § 205, p. 515; *see Garrett Biblical Institute v. Elmhurst State Bank*, 331 Ill. 308, 163 N. E. 1 (1928).

of this country extend their services and efforts far beyond spiritual exercises and public prayer. The churches, in the exercise of their devotions and beliefs have erected schools for the general as well as the spiritual education of their youth, they have provided hospitals, orphanages, recreational facilities and research laboratories and have organized groups for the study of social problems and for relieving the poor and the destitute. These services are performed in the name of particular denominations and are supported by contributions from its members, but are frequently available to those of any creed. It is within these broader spheres that the problem of the constitutionality of the application of public funds arises.

At times the courts have recognized the prodigious quantity of social work performed with religious backing and have been willing to uphold the right to apply public funds in support of these quasi-public institutions and services.⁶ At other times, however, the courts have held that religious sponsorship was sufficient to prevent the application of public funds without violating constitutional inhibitions.⁷

The difficulty presented by this problem is well illustrated by those cases involving the constitutionality of state statutes providing that text books may be supplied to children attending church supported schools or that transportation may be supplied to such children to and from school.

The state courts in applying to this problem the First and Fourteenth Amendments of the Federal Constitution together with the corresponding provisions of the state constitutions have, in the main, followed either of two trends, with the decisions equally divided. Some states have placed a strict interpretation on the letter of these Amendments and on the articles of their own constitutions with the result that in those states the statutes bestowing any aid on such students which would directly or incidentally benefit the institutions have been held unconstitutional.⁸ Other states, taking a more liberal view of the question, have found such statutes to conform with the spirit

⁶ *Bradfield v. Roberts*, 175 U. S. 291, 44 L. ed. 168 (1899); *Gerhardt v. Heid*, 66 N. D. 444, 267 N. W. 127 (1936); *Sargent v. Board of Education*, 177 N. Y. 317, 69 N. E. 722 (1904).

⁷ *Bennett v. City of La Grange*, 153 Ga. 428, 112 S. E. 482 (1922); *Collins v. Martin*, 290 Pa. 388, 139 Atl. 122 (1927); *Cook County v. Chicago Industrial School for Girls*, 125 Ill. 540, 18 N. E. 183 (1888). *But cf.* *Dunn v. Chicago Industrial School for Girls*, 280 Ill. 613, 117 N. E. 735 (1917).

⁸ *State ex rel. Traub v. Brown*, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934); *Sherrard v. Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963 (1943); *Williams v. Board of Trustees*, 173 Ky. 708, 191 S. W. 507 (1917); *Judd v. Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (1938); *Mitchell v. Consolidated School Dist. No. 201*, 17 Wash. (2d) 61, 135 P. (2d) 79 (1943); *Smith v. Donahue*, 202 App. Div. 656, 195 N. Y. Supp. 715, (3d Dep't 1922); *Gurney v. Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), *cert. denied*, 317 U. S. 588, 87 L. ed. 481 (1942); *cf. State ex rel. Van Straten v. Milquet*, 180 Wis. 109, 192 N. W. 392 (1923).

of the law, and, placing their emphasis on the welfare of the children of the nation regardless of their religious or educational affiliation, have allowed statutes containing such provisions to remain the law of the state.⁹

It is interesting to note at the outset of any discussion of the decisions bearing on this question that the content of the various state constitutions appear remarkably similar in those provisions pertaining to the separation of church and state and the more particular articles which restrict the application of public funds to public purposes alone. The slight dissimilarity of language, however, has been the basis of distinction in many of the cases.¹⁰ Thus the inclusion of a clause prohibiting "direct or indirect" aid to a denominational school was held to bar the providing of transportation in New York,¹¹ while the absence of such a clause in the California Constitution was propounded as one of the reasons for upholding the constitutionality of a similar statute in that state.¹²

The first problem presented to the courts in regard to such statutes is whether or not they violate the Fourteenth Amendment as constituting an application of public funds to private purposes. The courts that have answered this question in the negative have based their decisions on the undoubted authority of the state under its police power to promote the public welfare. Neither the Fourteenth nor any other Amendment was designed to interfere with this police power.¹³ It can hardly be denied that practical aid given to the young in securing an education promotes the public welfare.¹⁴

It is, of course, also necessary for a court to find that a public purpose will be served by the use of tax-raised money to pay the bus transportation of all school children.¹⁵ If the argument be made that a public purpose is not served, we must of necessity prohibit all school bus transportation; for if it violates the due process clause to tax *A* to pay for the transportation of the children of *B* to a parochial school, it also is violative of that clause to tax *A* to trans-

⁹ *Bowker v. Baker*, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946); *Nichols v. Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945); Board of Education of Baltimore County v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938); cf. *Cochran v. Board of Education*, 281 U. S. 370, 74 L. ed. 913 (1930); *Borden v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929); *Chance v. Mississippi State Textbook R. & P. Board*, 190 Miss. 453, 200 So. 706 (1941).

¹⁰ For a comparative treatment of the state statutes see 22 *NOTRE DAME LAW* 192 (1947).

¹¹ *Judd v. Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (1938).

¹² *Bowker v. Baker*, 73 Cal. App. (2d) 653, 167 P. (2d) 256, 259 (1946).

¹³ *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923 (1884).

¹⁴ *Bowker v. Baker*, 73 Cal. App. (2d) 653, 167 P. (2d) 256, 261 (1946).

¹⁵ "It is well settled that money for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State." *Jones v. Portland*, 245 U. S. 217, 221, 62 L. ed. 252, 255 (1917). See *Green v. Grazier*, 253 U. S. 233, 242, 64 L. ed. 878, 882 (1920).

port the children of *C* who attend the public school.¹⁶ On this there seems to be little disagreement, with a steady line of cases holding that education and the facilitation of it comes within the police power of the states.¹⁷

This then leaves us in a position where we are face to face with the question of whether the fact that a child attends a parochial school is to deprive him of school bus transportation because the State and Federal Constitutions forbid the granting of financial aid to a religious institution. And the answer to this must be found in the answer to still another question—To whom is the benefit given?¹⁸ The answer given by those states upholding the constitutionality of these statutes is that the direct benefit is to the individual child, with only an indirect or incidental benefit moving to the educational institution.¹⁹ It is reasoned that while the state cannot require that a child attend the public schools, since this would be an unlawful interference with the liberty of the parents in the upbringing of their children,²⁰ the state can and does prescribe courses of study and standards to be met by all the children of the state, regardless of the means the parent chooses to satisfy these requirements. One of the standards set by all states is that of minimum attendance and since this is a standard set by the state, the state may aid in any way possible its satisfaction.²¹ This view has been designated the "Child-Benefit Theory." Upon finding that the purpose of the statute is to aid the child and not the institution the courts apply two principals of constitutional law; first, that in considering the constitutionality of a statute the question presented is not whether it is possible to condemn it but whether it is possible to uphold it, and second, that it is not to be declared invalid because incidental to the main purpose there results an advantage to individuals.²² Based upon this

¹⁶ *Everson v. Board of Education*, — U. S. —, 91 L. ed. 472 (1947).

¹⁷ "Education is one of the purposes for which what is called the police power may be exercised." *Justice Holmes in Interstate Railway Co. v. Massachusetts*, 207 U. S. 79, 87, 52 L. ed. 111, 115 (1907).

¹⁸ Cases cited note 9 *supra*.

¹⁹ *Cf.* the language used in *Borden v. Louisiana State Board of Education*, 168 La. 1005, 1020, 123 So. 655, 660 (1929). "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. . . . The schools . . . are not the beneficiaries of these appropriations." This language was adopted by Chief Justice Hughes in *Cochran v. Board of Education*, 281 U. S. 370, 374, 74 L. ed. 913, 915 (1930).

²⁰ *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. ed. 1070 (1925).

²¹ *See Judd v. Board of Education*, 278 N. Y. 200, 218, 15 N. E. (2d) 576, 585 (1938) (dissenting opinion).

²² *People v. Standard Accident Insurance Co.*, 42 Cal. App. (2d) 409, 108 P. (2d) 923 (1941); *Board of Education of Baltimore County v. Wheat*, 174 Md. 314, 199 Atl. 628 (1938). ". . . the legislature must judge of the public

view these courts have found the statutes to be in accordance with the constitution.

Opposed to the above cases we find a line of decisions whose heart seems to be not in any affirmative exposition but in a refutation of the "Child-Benefit Theory."²³ They find the conclusion inescapable that such statutes serve to build up the institutions and by so doing come in conflict with our doctrine of separation of church and state.²⁴ It is this hesitancy to swerve one iota from the interpretation which some have placed upon this doctrine that is doubtless the thought behind many of these cases. Free transportation of pupils, it is said, induces attendance at the school and thereby promotes the interest of the private school or the religious institution that controls or directs it.²⁵ But as was pointed out by Justice Robinson in his dissent in *Mitchell v. Consolidated School Dist. No. 201*,²⁶ this argument is fallacious and has no validity unless it be assumed that if there were no busses there would be no pupils. However, can anyone doubt but that parents who pay taxes to support the public schools and yet share in the heavy expense of maintaining parochial schools, will continue in some way or another to send their children to those schools whether bus service is available or not? It is to be borne in mind that parochial schools are not of mere recent vintage; they existed here long before the question of bus transportation.

There is a tendency in many of the decisions which have rejected these statutes to over-emphasize the fact that religion is taught in parochial schools, and practically to ignore the undeniable fact that religion courses are taught in addition to and not in lieu of the secular subjects that are given in the public schools. It is not claimed that the state should or could aid the child in obtaining a religious education, but rather that the child is entitled to assistance in securing the secular education which the state requires that the parochial school give to its pupils, and which by inspection and examination, the state regulates and controls.²⁷

nature of the proposed expenditure; . . . their determination is presumed to be correct; . . . when the question is presented to the courts they will decide it as one of law, giving to the legislative action every presumption of regularity and validity, and refusing to hold the legislative body down to any narrow or technical rule, and not interfering unless the violation of the principle involved is clear and unquestionable." BLACK, CONSTITUTIONAL LAW § 175, p. 442, and cases there cited. See *Ashwander v. Valley Authority*, 297 U. S. 288, 348, 80 L. ed. 688, 712 (1936); *Crowell v. Benson*, 285 U. S. 22, 62, 76 L. ed. 598, 619 (1932).

²³ Cases cited note 8 *supra*.

²⁴ *Mitchell v. Consolidated School Dist. No. 201*, 17 Wash. (2d) 61, 135 P. (2d) 79 (1943).

²⁵ *Judd v. Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (1938).

²⁶ 17 Wash. (2d) 61, 135 P. (2d) 79 (1943).

²⁷ *Everson v. Board of Education*, — U. S. —, 91 L. ed. 472 (1947).

In *Everson v. Board of Education*²⁸ the problem of school bus transportation was presented to the United States Supreme Court. The statute authorizing the transportation of pupils of private and parochial schools was attacked on the familiar grounds of violation of the due process clause of the Fourteenth Amendment and as an appropriation of public funds to the support of a religious institution. The Supreme Court upheld the statute as constitutional, accepting the doctrine that a public purpose was served by facilitating the opportunity of children to get a secular education and impliedly reaffirmed the "Child-Benefit Theory", holding that the purpose of the statute was to provide in the interest of public welfare for the safe transportation of school children irrespective of their religious faith. The court recognized that the education secured in the denominational school served the public purpose and welfare equally as well as that acquired in the public or non-sectarian school. Since the public policy was served, the appropriation was constitutional in spite of any incidental aid given the religious institution. The court indicated that while the aid could not be given the school to further the teaching of a religion it might be given to forward the secular interests of the school. It was also pointed out that we must be careful not to deprive children of the benefits of public welfare legislation because of their religion while trying to hold inviolate the doctrine of separation of church and state.

This acceptance of the "Child-Benefit Theory" by the federal courts will doubtless have its effect upon the state courts. While the *Everson* case is one of first impression for the Supreme Court, the decision of that Court in *Cochran v. Louisiana State Board of Education*²⁹ in 1930, although it did not consider the question of state support of a religious school under the First Amendment, pointed the way to the holding in the later case. In the *Cochran* case the Court clearly and unmistakably accepted the doctrine that the grant of secular textbooks to students attending private schools was in no way a grant to a private use, but merely to serve the public purpose. It would follow as a necessary corollary from such a holding that the school received nothing but an incidental benefit and hence the grants could not be attacked under the First Amendment. If such a theory is applicable to textbooks, the essential tools of education, it is applicable to transportation to and from the school.³⁰

The history of this problem in the liberal State of New York presents an interesting commentary on the trend of public opinion with regard to school bus transportation for all children. In 1936 the New York Legislature amended the Education Law³¹ by au-

²⁸ *Ibid.*

²⁹ *Cochran v. Board of Education*, 281 U. S. 370, 74 L. ed. 913 (1930).

³⁰ See Mr. Justice Robinson dissenting in *Mitchell v. Consolidated School Dist. No. 201*, 17 Wash. (2d) 61, 135 P. (2d) 79, 83 (1943).

³¹ N. Y. EDUCATION LAW § 206.

thorizing, under certain conditions, the use of public funds for payment of transportation fares of pupils in attendance at both public and private schools. In 1938 the Statute came before the New York Court of Appeals in *Judd v. Board of Education*³² and that court in a four-to-three decision declared the statute to be violative of Article IX, Section 4,³³ of the State Constitution. This section prohibited the use, "directly or indirectly", of public funds, property or credit in aid of any school wholly or partially under the control or direction of a religious denomination. The Court placed emphasis on the prohibition against "indirect" aid stating, "Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interest and purposes." The majority thereby held, in effect, that the "Child-Benefit Theory" had no application here, since even under it, the statute would be unconstitutional as an indirect aid to the schools. Chief Justice Crane in his dissent found it possible to apply the "Child-Benefit Theory" even under the circumstances presented by the New York Constitution.

The legislature and the people of New York were quick to answer this rebuke of the courts by amending Article IX, Section 4,³⁴ by the insertion of a clause providing that the legislature may provide for the transportation of children to and from any school or institution of learning regardless of any religious affiliation. This is the law of New York today.

The chief objections of those who oppose the grant of funds to provide transportation for parochial school children were completely expressed by Mr. Justice Rutledge in his dissent in the *Everson* case. The fear that the grant of public money which in any way might inure to the benefit of a religious institution will surely bring the "quest for more" and that this "quest" will bring the struggle of sect against sect for a larger share, is probably the motivating force behind the dissent. Since the basis of the *Everson* case is, if anything, slightly broader than that of the earlier state and federal cases upholding the constitutionality of these statutes, it is feared that a continually broadening policy will be followed until the doctrine of separation of church and state as applied to public support of religious institutions disappears completely. There are few who oppose aid to these schools on the ground that it might eventually lead to the establishment of a national religion since such an effort would be opposed by both the religious and civil authorities, but there are many who fear that any public support of a religious institution might lead to an ever growing drain upon public funds.

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

³³ Now N. Y. CONST. Art. XI, § 4.

³⁴ *Ibid.*

This fear has existed for years and has had widespread influence. Yet the courts have continued to interpret the doctrine of separation of church and state in the spirit of sound public policy without catastrophic results. In 1899 the United States Supreme Court held the fact that a hospital would be staffed and directed by the members of a religious order was not sufficient to render unconstitutional, appropriation of government funds for the construction of additional hospital facilities.³⁵ Since that time there has been no great trend toward government support of hospitals managed by religious institutions. It is submitted that the appropriations sought by these institutions are usually sought to aid in some way the burdened facilities of the public institutions and to provide more efficiently the services affecting the public welfare. It is manifest, however, that the public policy and welfare are furthered by the services rendered by such institutions and that public support would be unquestionably constitutional were it not for the religious backing. If this be so it would appear that we exclude from any government aid the sectarian institution rendering public service because of its religious affiliation which is a practice also denied by the constitution.³⁶

It is also to be remembered that the government control and regulation which follow the appropriation of public funds would act always as a retarding force to public support of religious institutions. These institutions guard jealously their complete independence from any governmental control and it is doubtful that they will request or welcome any great amount of public support. But where, as in their schools, their secular curriculum is already controlled by the state and they are serving a purpose which the state has come to consider essential, there appears to be no valid reason for refusing aid to these schools to forward their secular program.³⁷

It would be unfortunate if by narrow interpretation of constitutional prohibitions against the establishment or support of religious institutions, the attendance at parochial schools was made more difficult or the attendance at public schools more attractive, and by such actions add to the already overburdened public school system. It is recognized by all that the church-supported schools in this country relieve the public school system of the cost of educating a large percentage of the children entitled to public education. Were these schools to be closed the increased burden on the public treasury

³⁵ *Bradfield v. Roberts*, 175 U. S. 291, 44 L. ed. 168 (1899).

³⁶ See *Everson v. Board of Education*, — U. S. —, 91 L. ed. 472, 480 (1947).

³⁷ "The freedom inherent in the mutual independence of the church and the state includes the right of the state to freedom from unwarranted hindrance in the name of religion. Eternal vigilance is not exhibited by injecting false issues into a question which concerns only the general welfare of all its citizens." *Chance v. Mississippi State Textbook R. & P. Board*, 190 Miss. 453, 200 So. 706, 710 (1941).

would be enormous. The standards and regulations of the state plus the numerous aids given the public school children have continued to increase until the church-supported school has found itself unable to meet such demands. It is under these circumstances that the schools request that their pupils be given the benefit of public welfare legislation. The support of a religious institution is remote at best and the relatively small expenditure of public funds involved may save the treasury the much larger cost of educating children induced to attend public schools.

The principle of separation of church and state as set forth in our constitution is still a cornerstone of our democratic system. The application of this principle, however, is not immutable. The dynamic nature of the constitution requires that its provisions be interpreted and extended in the light of conditions prevalent in each successive generation. In relation to public support of sectarian institutions this is no less true than in relation to other problems. It is submitted that the time has come for a re-examination of the incidents attending the First Amendment and a recognition of the fact that the circumstances which lead to its strict interpretation no longer exist. The courts must be vigilant in protecting our constitutional guarantees but they are not bound by interpretations of another age.

GEORGE F. MASON, JR.,
JAMES R. SCHULE.

ANGEL V. BULLINGTON

STATE LIMITATION ON FEDERAL JURISDICTION

Where the only basis for federal jurisdiction is diversity of citizenship, must the federal courts apply the jurisdictional limitations of the state in which the action is being tried? The answer to this question is determined by the designation of jurisdictional limitation as substantive or adjective law.

I

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general'