THE CONSTITUTIONALITY OF FURNISHING PUBLICLY FINANCED TRANSPORTATION TO PRIVATE AND PAROCHIAL SCHOOL STUDENTS IN MISSOURI

GERALD TOCKMAN*

> The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.[1]

The proceedings of the House Judiciary Committee of the Seventy-Second General Assembly of the State of Missouri in connection with its consideration of House Bill No. 367, providing for the free transportation of public, private and parochial school students, brought to the fore the divisive effect and emotional reactions with which such legislation so often becomes embroiled. The volume of attendance at the public hearings conducted by the Committee[2] in considering the proposed legislation and the force and sincerity of both proponents and opponents of the proposed legislation in presenting their views with regard to it[3] amply demonstrated the viability of that particular wisdom upon which both federal and state constitutional proscriptions against interference by government with, and aid or support by government to, religion were and are based. Similarly, the withdrawal of large numbers of parochial school students from the parochial school system and their token enrollment in the public schools of the State,[4] resulting from the failure of the proposed legislation to clear the Committee, demonstrated the equally uncontroverted fact that the parochial and private school systems have assumed and carry financial expenditures and outlay which, but for their existence, would impress a significant burden upon the State.

The failure of the House Judiciary Committee to report out and

---

* Associate, Lewis, Rice, Tucker, Allen and Chubb, St. Louis, Missouri.

1. Everson v. Board of Educ., 330 U.S. 1, 53 (1946) (dissenting opinion of Rutledge, J.).

2. See, *e.g.*, St. Louis Globe-Democrat, April 4, 1963, p. 6A, col. 1; St. Louis Post-Dispatch, April 4, 1963, p. 3A, col. 2.

3. See, *e.g.*, St. Louis Globe-Democrat, May 7, 1963, p. 1A, col. 8.

4. See Hermann, *The Church School Issue*, The National Observer, May 13, 1963, p. 7, cols. 3-6; St. Louis Globe-Democrat, May 8, 1963, p. 1A, col. 2; St. Louis Post-Dispatch, May 8, 1963, p. 1A, col. 1; St. Louis Globe-Democrat, May 7, 1963, p. 1A, col. 7; St. Louis Post-Dispatch, May 7, 1963, p. 1A, col. 1; St. Louis Globe-Democrat, May 3, 1963, p. 1A, col. 5.

present House Bill No. 367 to the Legislature also focused attention upon that question apparently unanswered by the Supreme Court of Missouri in its decision in *McVey v. Hawkins*.[5] In the *McVey* case, the narrow ground chosen by the court in voiding the use of public school transportation facilities for the conveyance of parochial school students[6] expressed the court's reluctance to consider, if not its determination to leave open, the question of whether general revenues may be constitutionally used in Missouri in providing transportation to non-public school students, and it was the intendment of House Bill No. 367 to fit within the area of unresolved constitutional permissibility apparently contained in that case.[7]

---

5. 364 Mo. 44, 258 S.W.2d 927 (1953).

6. In the *McVey* case, the plaintiffs, taxpayer residents of the defendant school district, sought an injunction against the use of public school buses for the transportation of school pupils attending parochial schools in another school district, part of the way being within the defendant school district. The plaintiffs contended that three constitutional provisions had been violated by the school board's action in furnishing such transportation: the first providing that the "public school fund" is to be used exclusively for the establishment and maintenance of free public schools (MO. CONST. art. IX, §§ 3, 5); the second prohibiting any expenditure to aid or support any school controlled by church or sectarian denomination (MO. CONST. art. IX, § 8); and the third precluding the spending of public money "directly or indirectly" in aid of any church, sect or religious denomination (MO. CONST. art. I, § 7). The court found that a portion of the funds being used by the defendant school district in furnishing the contested transportation was derived from the income of the public school fund and stated the issue as follows:

> In view of the issues presented on this appeal, we think the *essential question is whether the use of the public school moneys*, to wit, the incidental funds of the district, for defraying the expenses of transporting the parochial school children to, or part way to and from, a private school *is a use for the purpose of "establishing and maintaining free public schools and for no other uses or purposes whatsoever,"* as provided by Sec. 5, Art. IX of the Constitution. . . . *Also involved is the question of whether the income from the State Public School Fund is applied "to the support of free public schools,"* as provided by Sec. 3, Art. IX *and whether such income and the other moneys appropriated are properly used within the meaning of the act of the Legislature setting the fund aside "to be used for the support of the free public schools" and "to be apportioned and distributed for the support of the free public schools."* McVey v. Hawkins, 364 Mo. 44, 53-54, 258 S.W.2d 927, 932 (1953). (Emphasis added.)

The court held that the use of the fund mentioned for the provision of transportation to parochial school children was not a use for the establishment and maintenance of free public schools and therefore not within the purpose for which the fund was dedicated and appropriated; on this basis, that such use of the "public school fund" transgressed the first constitutional provisions asserted by the plaintiffs, the court enjoined such use of the fund and ordered that the transportation involved be discontinued.

7. See, *e.g.*, H.B. 367, 72d General Assembly (1963) p. 8, lines 5-15, which provides:

> All moneys received from the state for school transportation and all moneys derived from taxation and set aside for transportation purposes by the board of education or board of directors shall be deposited in and credited to the district school transportation fund. *No moneys from the state public school*

In *McVey v. Hawkins* the court, by limiting its decision to a determination that the non-public school transportation there involved could not be financed by the expenditure of funds constitutionally interdicted from use for purposes other than the establishment and maintenance of free public schools, refused to pass upon the contention that such expenditure could be sustained as a valid exercise of the state's police or welfare powers.[8] House Bill No. 367, in providing for the establishment of a transportation fund comprised of general revenues other than those constitutionally inhibited to the use of the free public schools, sought to overcome the only apparent constitutional proscription against furnishing transportation to non-public school students contained in the *McVey* decision and premised the expenditure of such general revenues upon the ability of the state to utilize tax-raised funds in carrying out and fulfilling those public purposes contained within the valid exercise of the state's general police and welfare powers. In thus framing the provision of publicly-financed transportation to school students as the exercise of the state's police or welfare powers, the issue of whether the furnishing of such transportation would constitute the use of public funds for other than a public purpose[9] or would transgress constitutional provisions assur-

---

fund shall be deposited in or credited to any school transportation fund hereby established. All costs of free transportation of public, private, and parochial school pupils to and from school and all costs of administration of the fund shall be paid from the school transportation fund of the district. (Emphasis added.)

8. We need not review the cases cited in support of respondents' contention that the transportation at public expense of all school children to and from whatever schools they may attend (public or private, sectarian or non-sectarian) is a valid, constitutional and lawful exercise of the police power of the state, *because in this case we have a very different question,* to wit, can such transportation be had to a private school at the expense of the public school fund and with funds limited by the constitution to the exclusive purpose of establishing and maintaining free public schools. McVey v. Hawkins, 364 Mo. 44, 55, 258 S.W.2d 927, 933 (1953). (Emphasis added.)

9. Mo. CONST. art. III, § 36 provides, in part, as follows:

All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law.

Mo. CONST. art. III, § 39 provides, in part, as follows:

The general assembly shall not have power:

(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation . . . .

Mo. CONST. art. X, § 3 provides, in part, as follows:

Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

ing the separation of church and state[10] were subsumed by the argument that the failure to extend such "welfare" benefits to pupils enrolled in the private and parochial school systems would discriminate against and interfere with the ability of such students to exercise their constitutional rights to receive instruction in educational facilities of their own choosing. This invocation of the state's police or welfare powers, and the positing of the existence of a public purpose, has often been used as an argument for, and has sometimes successfully resulted in, the expenditure of public monies for constitutionally proscribed purposes.[11]

The contentions that the furnishing of transportation to assist those students in need of the same in the fulfillment of their obligations under compulsory education laws constitutes public welfare legislation, and that the benefits of such legislation cannot be constitutionally withheld from any member of that class of the public intended to be benefited thereby merely because of such member's exercise of religious freedom in attending a parochial school or exercise of the constitutional right to receive instruction in educational institutions other than the public school system, have furnished an emotionally persuasive argument to various courts. However, those courts, in accepting the initial contention that the furnishing of such transportation constitutes the enlightened extension of the state's police and welfare powers, have lost sight of the basic constitutional precepts and principles supporting and embodied in limitations upon the state's ability to use public monies and proscriptions against interference by the state with religion, by aid to it or restrictions upon the free exercise of it. It is the purpose of this article to set forth those matters which are relevant to consideration of the constitutional question involved in connection with furnishing publicly-financed transportation to private and parochial school students in order to delineate that area of controversy with which any intelligible opinion on this question must deal. The objective of this article is to present an unbiased analysis of the legal factors involved, giving neither succor to those who raise the specter of papal tyranny nor assuagement to those who asseverate the progressing "godlessness" of this country.

I. VALIDITY OF THE USE OF TAX-RAISED FUNDS— THE EXISTENCE OF A PUBLIC PURPOSE

The provisions of state constitutions set forth a body of limitations upon the powers of the legislature and the other departments of state

10. Mo. CONST. art. I, §§ 5-7, art. IX, § 8.

11. See LANOUE, DECISION FOR THE SIXTIES: PUBLIC FUNDS FOR PAROCHIAL SCHOOLS? 6 (Department of Religious Liberty, National Council of Churches 1963).

government.[12] The most prominent limitation is that restricting the ability of the state to levy and collect taxes and to expend the funds thereby obtained; such restrictions upon the power of the state to appropriate and expend funds derived from the public through taxation generally prescribe those limitations inherent in the requirement that such appropriations and expenditures be made for public purposes only.[13] In determining whether that authority of law necessary to the appropriation and expenditure of public funds is present, the first and fundamental inquiry is whether such funds are to be used for a public as opposed to a private purpose.[14] The scope of such inquiry is not necessarily limited to a determination of the nature or character of the recipient to whom or for whose benefit such funds are appropriated and expended but includes the ascertainment of the purpose of the payment made. Thus, the use of public monies within the limitations of the existence of a public purpose may be found where the recipient of those funds performs a paramount public service or function of a type or nature essential to the well-being of the state and its citizenry, and such service or function is of a type which the state lawfully could perform but such performance has neither been undertaken nor fully assumed.[15] In such limited circumstances, the appro-

12. State v. Chicago, B. & Q. R.R., 239 Mo. 196, 230, 143 S.W. 785, 793 (1912); see 1 COOLEY, CONSTITUTIONAL LIMITATIONS 3-6 (8th ed. 1927).

13. See statutes cited note 9 *supra;* LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 992-93 (2d ed. 1959).

14. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55 (1937); City of Parkersburg v. Brown, 106 U.S. 487 (1883); Savings & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875); Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963); Alameda County v. Janssen, 16 Cal. 2d 276, 106 P.2d 11 (1940); San Diego County v. Hammond, 6 Cal. 2d 709, 59 P.2d 478 (1936); Wines v. Garrison, 190 Cal. 650, 214 Pac. 56 (1923); Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 Pac. 678 (1922); City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1 (1938); Krebs v. Board of Trustees of Teachers' Retirement Sys., 410 Ill. 435, 102 N.E.2d 321 (1951); Duncan v. Smith, 262 S.W.2d 373 (Ky. Ct. App. 1953); Opinions of the Justices, 320 Mass. 773, 67 N.E.2d 588 (1946); Cleveland v. City of Detroit, 324 Mich. 527, 37 N.W.2d 625 (1949); Mills v. Stewart, 76 Mont. 429, 247 Pac. 332 (1926); Hoyt v. Broome County, 285 N.Y. 402, 34 N.E.2d 481 (1941); People v. Westchester County Nat'l Bank, 231 N.Y. 465, 132 N.E. 241 (1921; Stein v. Brown, 125 Misc. 692, 211 N.Y. Supp. 822 (Sup. Ct. 1925); Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281 (1945); Stutsman v. Arthur, 73 N.D. 504, 16 N.W.2d 449 (1944); Wheelon v. South Dakota Land Settlement Bd., 43 S.D. 551, 181 N.W. 359 (1921); State *ex rel.* Cashman v. Sims, 130 W. Va. 430, 43 S.E.2d 805 (1947).

15. Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963) (hospital services for the needy); St. Hedwigs School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919) (school for the commission of juvenile delinquents); Dunn v. Chicago Industrial School, 280 Ill. 613, 117 N.E. 735 (1917) (special school to which state court was authorized to commit delinquents); St. Mary's Industrial School v.

priation and expenditure of tax-raised funds in payment to various bodies and institutions which are privately owned and operated for the rendering of "public services" by them may be constitutional and any "incidental" or "indirect" benefit or resultant advantage inuring to such recipient would be immaterial.[16]

Where "public services," which could lawfully be assumed and performed by the state in the exercise of its police and welfare powers, are rendered by privately owned and operated sectarian institutions, state court decisions have reached differing conclusions concerning the propriety of using the "payment for services" concept as a basis for asserting the constitutionality of the appropriation and expenditure of public funds to such institutions.[17] Certain of those state court decisions which have upheld the payment of public monies to such institutions have stressed the fact that the services performed by the institution involved are completely secular and unaffected by any sectarian influence whatever;[18] whereas other decisions, in upholding the

---

Brown, 45 Md. 310 (1876) (provision of care and training for foundlings, the insane, the indigent and the infirm); St. Johns College v. Purnell, 23 Md. 629 (1865) (educational institution supplying specialized training); Allegheny County School v. Maffit, 22 Md. 121 (1864) (educational institution supplying specialized training); St. Johns College v. State, 15 Md. 330 (1859) (educational institution supplying specialized training); Finan v. Cumberland, 154 Md. 563, 141 Atl. 269 (Ct. App. 1928) (hospital); Baltimore v. Keeley Institute, 81 Md. 106, 31 Atl. 437 (Ct. App. 1895) (provision of treatment for chronic alcoholism); Sargent v. Board of Educ., 177 N.Y. 317, 69 N.E. 722 (1904), *affirming* 76 App. Div. 588, 79 N.Y. Supp. 127 (1902), *affirming* 35 Misc. 321, 71 N.Y. Supp. 954 (Sup. Ct. 1901) (orphanage); Dickman v. School Dist. No. 62C, 366 P.2d 533 (Ore. 1961) (dictum), *cert. denied*, 371 U.S. 823 (1962).

16. See cases cited note 15 *supra*.

17. *Compare* St. Hedwigs School v. Cook County, *supra* note 15; Dunn v. Chicago Industrial School, *supra* note 15; St. Mary's Industrial School v. Brown, *supra* note 15; St. Johns College v. Purnell, *supra* note 15; Allegheny County School v. Maffit, *supra* note 15; St. Johns College v. State, *supra* note 15; Finan v. Cumberland, *supra* note 15; Baltimore v. Keeley Institute, *supra* note 15; Sargent v. Board of Educ., *supra* note 15; St. Patricks Orphan Asylum v. Board of Educ., 34 How. Pr. 227 (N.Y. 1867); People *ex rel.* The Roman Catholic Orphan Asylum Soc'y v. Board of Educ., 13 Barb. 400 (N.Y. 1851) *with* Bennet v. City of LaGrange, 153 Ga. 428, 112 S.E. 482 (1922); Cook County v. Chicago Industrial School, 125 Ill. 540, 18 N.E. 183 (1888); State *ex rel.* Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882); Collins v. Martin, 290 Pa. 388, 139 Atl. 122 (1927); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891); State *ex rel.* McPherren v. Carter, 30 Wyo. 22, 215 Pac. 477 (1923).

18. Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963); St. Mary's Industrial School v. Brown, 45 Md. 310 (1876); St. Johns College v. Purnell, 23 Md. 629 (1865); Allegheny County School v. Maffit, 22 Md. 121 (1864); St. Johns College v. State, 15 Md. 330 (1859); Finan v. Cumberland, 154 Md. 563, 141 Atl. 269 (Ct. App. 1928); Baltimore v. Keeley Institute, 81 Md. 106, 31 Atl. 437 (Ct. App. 1895); Sargent v. Board of Educ., 177 N.Y. 317, 69 N.E. 722 (1904),

constitutionality of such payments, have implicitly recognized the necessity of sacrificing constitutional principles requiring the separation of church and state to the urgent needs of the state and community.[19] Other state courts have rejected the validity of the theory of payment for secular services as a justification for the appropriation and expenditure of public funds to sectarian institutions and, notwithstanding the contention that a public function or service is being performed thereby, have held that such payments transgress constitutional restrictions upon the use of public funds for public purposes in that they result, at least in part, in the relief and support of the sectarian institution or body involved.[20] In the majority of these decisions, regardless of the particular result reached through application of or refusal to apply the "payment for services" concept, the courts have recognized the fundamental constitutional precept that only where the appropriation and expenditure is lawfully authorized because the purpose of it is a public one, may tax-raised monies constitutionally be used for the benefit of or paid to private individuals or privately owned and operated bodies and institutions.

Although the state court decisions in the area of "payment for services" are by no means conclusive with regard to the constitutionality of payment to sectarian institutions for the rendition of welfare services to the state and its citizenry, each has recognized that which is implicit in the decision of the United States Supreme Court in a

---

affirming 76 App. Div. 588, 79 N.Y. Supp. 127 (1902), *affirming* 35 Misc. 321, 71 N.Y. Supp. 954 (Sup. Ct. 1901).

19. St. Hedwigs School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919); Dunn v. Chicago Industrial School, 280 Ill. 613, 117 N.E. 735 (1917); St. Patricks Orphan Asylum v. Board of Educ., 34 How. Pr. 227 (N.Y. 1867); People *ex rel.* The Roman Catholic Orphan Asylum Soc'y v. Board of Educ., 13 Barb. 400 (N.Y. 1851).

20. Bennet v. City of LaGrange, 153 Ga. 428, 112 S.E. 482 (1922) (contract between municipality and sectarian institution, and payments to institution thereunder, for performance of city's charitable work held invalid); Cook County v. Chicago Industrial School, 125 Ill. 540, 18 N.E. 183 (1888) (payments to correctional institution to which court was authorized to commit delinquents held invalid because of sectarian influence); State *ex rel.* Nevada Orphan Asylum v. Hallock, 16 Nev. (36 Pac. St. R.) 373 (1882) (payment to sectarian orphanage held invalid notwithstanding the fact that such payment was made for the physical necessities of wards only); Collins v. Martin, 290 Pa. 388, 139 Atl. 122 (1927) (holding that department of welfare cannot expend funds appropriated for its use for the treatment of indigent sick in sectarian hospitals and that denominating what is secured in the treatment of indigent sick in such hospitals as "hospital service" does not remove it from constitutional prohibitions); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891) (payments to sectarian institution for the provision of specialized educational training in courses in public school teaching held invalid); State *ex rel.* McPherren v. Carter, 30 Wyo. 22, 215 Pac. 477 (1923) (payments for charitable services held invalid).

similar such case, *Bradfield v. Roberts*,[21] i.e., where such "services" are rendered in the context of sectarian influences and controls, payment for them out of public funds is unconstitutional.[22] State courts have generally refused to apply the "payment for services" theory as a means for the constitutional validation of the appropriation and expenditure of public monies to, or in aid or support of, parochial and private schools, notwithstanding the contention that the public receives a benefit from the operation of them through the increase in educational facilities and through the spread and diffusion of knowledge; noting that parochial educational institutions are operated in a sectarian manner and are subject to church authority and, in the case of other private educational institutions, that the same are subject to private control and can select and choose those whom it wishes to re-

21. 175 U.S. 291 (1899).

22. In the *Bradfield* decision, the Court held that the payment of money to a hospital incorporated under an act of Congress, as compensation for the treatment and cure of poor patients for whom the government was responsible, did not contravene constitutional provisions against the establishment of religion. The Court held that the mere fact that the members of the hospital corporation were also members of a church and of a monastic order or sisterhood of the church, did not render the contract between the hospital and the government for the provision of hospital services to "federal" patients unconstitutional. The Court particularly adverted to the fact that the hospital corporation as such did not constitute a religious or sectarian body and that the services being rendered were in no way sectarian or subject to sectarian influence. Thus, the Court concluded, at 298-99,

> It is simply the case of a secular corporation being managed by people who hold to the doctrine of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists. *The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but, on the contrary, those powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution.* . . . As stated in the opinion of the court of appeals, this corporation "is not declared the trustee of any church or religious society. Its property is to be acquired in its own name and for its own purposes; that property and its business are to be managed in its own way, subject to no visitation, supervision, or control by any ecclesiastical authority whatever but only to that of the government which created it. In respect, then, of its creation, organization, management, and ownership of property it is an ordinary private corporation whose rights are determinable by the law of the land, and the religious opinions of whose members are not subjects of inquiry." (Emphasis added.)

In Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963), the court stressed that under the lease involved, the Sisters of St. Joseph of Newark were required to operate and maintain the hospital at their own expense and were proscribed from denying admission or care because of race, color or creed and further were required to establish only those rates and charges which were sufficient to pay for the cost of operation. The court further noted that there was no showing that anything in the arrangement between the City and the sectarian group would allow for the provision of care and treatment in a sectarian context and concluded: "The fact that specific sectarian beliefs may be entertained by those persons [that is the members of the society] does not bar the city from achieving its valid secular goal of caring for the sick." *Id.* at 724.

ceive for enrollment, these courts, either implicitly or explicitly, have held that the incidental benefits to the public arising out of the operation of such parochial and private educational institutions are not within that category of public benefits and interests included within the scope of "public purpose" so as to authorize resort to the power of taxation.[23] Thus, the fact that a particular expenditure may result in the accrual of benefits to the public does not demonstrate the existence of a "public purpose"; it is necessary, in order to constitutionally appropriate and expend tax-raised funds, to demonstrate that the purpose of the payment of such funds is to promote the general welfare of all members of the public, either through the extension to them of certain benefits or by the state's performance of functions and services designed to accomplish matters of public concern.[24]

In rejecting the contention that the use of public monies for the provision of educational aids and facilities to public school students is violative of constitutional provisions interdicting the appropriation and expenditure of tax-raised funds for the benefit of or to private individuals, state courts have found the authorization for such payments in that public concern for the preservation and perpetuation of the state's form of government and its institutions expressed in constitutional provisions for the establishment and maintenance of a free public educational system.[25] This public concern for the universal diffusion of education to the state's citizenry, stated and reflected in

23. See, *e.g.*, People v. McAdams, 82 Ill. 356 (1876); Wright v. School Dist. No. 27, 151 Kan. 485, 99 P.2d 737 (1940); Atchison, T. & S.F. R.R. v. City of Atchison, 47 Kan. 712, 28 Pac. 1000 (1892); Jenkins v. Andover, 103 Mass. 94 (1869); State *ex rel.* Public School Dist. v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932); Curtis's Adm'r v. Whipple, 24 Wis. 350 (1869).

24. See, *e.g.*, Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 Pac. 678 (1922) (upholding provision to war veterans of free textbooks and transportation to the school of their choice on the ground that services rendered in the armed forces are "public services" within constitutional provisions authorizing expenditures only for public purposes and proscribing use of such funds for private individuals or purposes); Meredith v. Ray, 292 Ky. 326, 166 S.W.2d 437 (1942) (upholding the provision of aid to dependent children); Bowman v. Frost, 158 S.W.2d 945 (Ky. 1942) (sustaining the validity of legislature providing aid to the needy blind); see also, Commonwealth *ex rel.* Wehrle v. Plummer, 21 Pa. Dist. 182 (C.P. 1911), *aff'd*, 241 Pa. 224, 88 Atl. 481 (1913) (upholding the provision of public school manual training facilities to parochial school students).

25. Pasadena City High School Dist., v. Upjohn, 206 Cal. 775, 276 Pac. 341 (1929); Macmillan Co. v. Clarke, 184 Cal. 491, 194 Pac. 1030 (1920); School Dist. v. Atzenweiler, 67 Kan. 609, 73 Pac. 927 (1903); Dennis v. Wrigley, 175 Mich. 621, 141 N.W. 605 (1913); Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913); Affholder v. State, 51 Neb. 91, 70 N.W. 544 (1897); Berry v. School Bd., 78 N.H. 30, 95 Atl. 952 (1915); Fogg v. Board of Educ., 76 N.H. 296, 82 Atl. 173 (1912); Seiler v. Gelhar, 54 N.D. 245, 209 N.W. 376 (1926); Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43 (1915); Carey v. Thompson, 66 Vt. 665, 30 Atl. 5 (1894); Pagel v. School Dist. No. 1, 184 Wis. 251, 199 N.W. 67 (1924).

the introductory declarations of various state constitutional provisions for public school systems,[26] has been found to furnish that public purpose necessary to the constitutional utilization of public funds; in thus positing the existence of a public purpose, the courts have found in it authorization for the appropriation and expenditure of tax-raised funds in order to assure the existence of an efficient system of free public education.[27] Thus, unless there exist express constitutional limitations in this area, the public interest in and the public purpose underlying the public educational process furnish the constitutional authorization for the use of public monies in furnishing those ends, means and appliances necessary or useful to the effective operation of that educational process.[28] These decisions all reflect the fact that the

26. MO. CONST. art. IX, § 1(a) provides, in part, as follows:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

See, LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, *op. cit. supra* note 13, at 369-70, 374; LANOUE, *op. cit. supra* note 11 at 12-14; CUBBERLY, PUBLIC EDUCATION IN THE UNITED STATES 113 (1919).

27. Pasadena City High School Dist. v. Upjohn, 206 Cal. 775, 276 Pac. 341 (1929); Macmillan Co. v. Clarke, 184 Cal. 491, 194 Pac. 1030 (1920); *In re* Kindergarten Schools, 18 Colo. 234, 32 Pac. 422 (1893); Williams v. Board of Pub. Instruction, 133 Fla. 624, 182 So. 837 (1938); Board of Pub. Instruction v. Kennedy, 109 Fla. 153, 147 So. 250 (1933); Malounek v. Highfill, 100 Fla. 1428, 131 So. 313 (1930); Fitzpatrick v. Johnson, 174 Ga. 746, 163 S.E. 908 (1932); School City of Marrion v. Forrest, 168 Ind. 94, 78 N.E. 187 (1906); Bruggeman v. Independent School Dist. No. 4, 227 Iowa 661, 289 N.W. 5 (1939); Lamphier v. Tracy Consol. School Dist., 224 Iowa 1035, 277 N.W. 740 (1938); Dermit v. Sergeant Bluff Consol. Independent School Dist., 220 Iowa 344, 261 N.W. 636 (1935); Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Bathgen v. Reorganized School Dist., 365 Mo. 518, 284 S.W.2d 516 (1955); State *ex rel.* Clark v. Gordon, 261 Mo. 631, 170 S.W. 892 (1914); State *ex rel.* Lien v. School Dist. No. 73, 106 Mont. 223, 76 P.2d 330 (1938); McBride v. Reardon, 105 Mont. 96, 69 P.2d 975 (1937); Affholder v. State, 51 Neb. 91, 70 N.W. 544 (1897); People *ex rel.* Board of Educ. v. Graves, 243 N.Y. 204, 153 N.E. 49 (1926), *reversing* 215 App. Div. 744, 213 N.Y. Supp. 767 (1925); Rhynehart v. Spaulding, 137 Misc. 820, 244 N.Y. Supp. 569 (Sup. Ct. 1930), *aff'd*, 232 App. Div. 785, 249 N.Y. Supp. 897 (1931); Rysdam v. School Dist. No. 67, 154 Ore. 347, 58 P.2d 614 (1936); Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43 (1915); McGee v. Franklin Pub. Co., 15 Tex. Civ. App. 216, 39 S.W. 335 (1897); Beard v. Board of Educ., 81 Utah 51, 16 P.2d 900 (1932).

28. *Compare* Macmillan Co. v. Clarke, 184 Cal. 491, 194 Pac. 1030 (1920) (upholding provision of free textbooks to public high school students); *In re* Kindergarten Schools, *supra* note 27 (upholding legislation for the establishment of kindergarten facilities for children under six years of age); School City of Marrion v. Forrest, *supra* note 27 (sustaining legislation providing for the establishment and maintenance of free public libraries) *with* Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918) (notwithstanding the fact that greater educational advantages and other benefits were afforded to pupils of public school, the

free public school system is not primarily a service to the individual pupil enrolled in it but a service to the state and community in providing that general diffusion of knowledge and intelligence necessary and essential to the preservation and perpetuation of government, its institutions, and the rights and liberties of the people. Thus, expenditures designed to make the public educational process more effectual and pervasive are constitutionally analogous to the appropriation and expenditure of tax-raised funds for fire and police protection and the numerous other public service utilities which, provided for and maintained by taxation and ministering to individual needs, are premised upon and designed for the benefit of the general public.

The utilization of the state's power and public monies in furtherance of that public purpose and function effected by the general diffusion of knowledge and intelligence and reflected in the constitutional mandate providing for the free public education of the youth of the state in order to assure the same, is reflected in the historical circumstances surrounding the closing of the many small public district schools and the merger of their combined pupils into consolidated public schools in order to assure and provide for efficient educational facilities.[29] As

contract or arrangement between the public school and the parochial school providing for common use of physical facilities was contrary to public policy and therefore invalid); Williams v. Board of Trustees, *supra* note 27 *(semble)*.

29. See, Hendrix v. Morris, 127 Ark. 222, 191 S.W. 949 (1917); Board of Pub. Instruction v. Kennedy, 109 Fla. 153, 147 So. 250 (1933); Malounek v. Highfill, 100 Fla. 1428, 131 So. 313 (1930); Board of Educ. v. Hunt, 159 Ga. 749, 126 S.E. 789 (1925); Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947); Lanphier v. Tracy Consol. School Dist., 224 Iowa 1035, 277 N.W. 740 (1938); *Ex parte* County Bd. of Educ., 260 Ky. 246, 84 S.W.2d 59 (1935); County Bd. of Educ. v. Goodpaster, 260 Ky. 198, 84 S.W.2d 59 (1935); Eastham v. Greenup County Bd. of Educ., 247 Ky. 16, 56 S.W.2d 550 (1933); Audas v. Logan County Bd. of Educ., 246 Ky. 534, 55 S.W.2d 341 (1932); Knox County Bd. of Educ. v. Fultz, 241 Ky. 265, 43 S.W.2d 707 (1931); Byrne v. Caldwell, 227 Ky. 59, 11 S.W.2d 1004 (1928); Gragg v. County Bd. of Educ., 200 Ky. 53, 252 S.W. 137 (1923); Gibson v. Anderson, 170 Ky. 664, 186 S.W. 497 (1916); Dennis v. Wrigley, 175 Mich. 621, 141 N.W. 605 (1913); Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913); State *ex rel.* Clark v. Gordon, 261 Mo. 631, 170 S.W. 892 (1914); Berry v. School Bd., 78 N.H. 30, 95 Atl. 952 (1915); Fogg v. Board of Educ., 76 N.H. 296, 82 Atl. 173 (1912); People *ex rel.* Board of Educ. v. Graves, 243 N.Y. 204, 153 N.E. 49 (1926), *reversing* 215 App. Div. 744, 213 N.Y. Supp. 767 (1925); Rhynehart v. Spaulding, 137 Misc. 820, 244 N.Y. Supp. 569 (Sup. Ct. 1930), *aff'd*, 232 App. Div. 785, 249 N.Y. Supp. 897 (1931); Seiler v. Gelhar, 54 N.D. 245, 209 N.W. 376 (1926); Eastgate v. Osago School Dist., 41 N.D. 518, 171 N.W. 96 (1919); State *ex rel.* Brand v. Mostad, 28 N.D. 244, 148 N.W. 831 (1914); Commissioner *ex rel.* Mellot v. Belfast Township School Dist., 30 Pa. Dist. 430 (C.P. 1920); Jones v. Clifford Township School Directors, 41 Pa. County Ct. 387 (C.P. 1913), *aff'd*, 61 Pa. Super. 73 (1915); Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43 (1915); Proctor v. Hufnail, 111 Vt. 365, 16 A.2d 518 (1940); Carey v. Thompson, 66 Vt. 665, 30 Atl. 5 (1894); Visser v. Nooksack Valley School Dist. No. 506, 207 P.2d 198 (Wash. 1949); Hein v.

a consequence of such consolidation, many pupils of the former district schools were inconvenienced in that the consolidated schools, being located in centralized areas, were less accessible and, in order to enable those pupils more substantially affected by the increase in distance to school consequent upon consolidation to obtain that general diffusion of knowledge and intelligence embodied in the provision for a public educational process, the provision of transportation to them became a necessity.[30] Decisions in this area reflect the fact that the public pur-

---

Luther, 197 Wis. 88, 221 N.W. 386 (1928); Pagel v. School Dist. No. 1, 184 Wis. 251, 199 N.W. 67 (1924); See also, Tow v. Dunbar Consol. School Dist., 200 Iowa 1254, 206 N.W. 94 (1925); Board of Educ. v. Wheat, 174 Md. 314, 199 Atl. 628 (Ct. App. 1938).

30. See Shores v. Elmore County Bd. of Educ., 241 Ala. 464, 3 So.2d 14 (1941); Scott v. Mattingly, 236 Ala. 254, 182 So. 24 (1938); Hendrix v. Morris, *supra* note 29; Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1961); Reaves v. Sadler, 136 Fla. 553, 189 So. 41 (1939); Williams v. Board of Pub. Instruction, 133 Fla. 624, 182 So. 837 (1938); Keever v. Board of Educ., 188 Ga. 299, 3 S.E.2d 886 (1939); Douglas v. Board of Educ., 164 Ga. 271, 138 S.E. 226 (1927); Board of Educ. v. Hunt, *supra* note 29; Jackson School Township v. State *ex rel.* Garrison, 204 Ind. 251, 183 N.E. 657 (1932); Lyle v. State *ex rel.* Smith, 172 Ind. 502, 88 N.E. 850 (1909); State *ex rel.* Beard v. Jackson, 168 Ind. 384, 81 N.E. 62 (1907); Nelson v. State *ex rel.* Martin, 168 Ind. 491, 81 N.E. 486 (1907); State *ex rel.* Cook v. Widolff, 91 Ind. App. 86, 167 N.E. 633 (1929); Riecks v. Independent School Dist., 219 Iowa 101, 257 N.W. 546 (1934); Queeney v. Higgins, 136 Iowa 573, 114 N.W. 51 (1907); Schumaker v. School Dist. No. 141, 137 Kan. 844, 22 P.2d 441 (1933); Hildebrand v. School Dist. No. 59, 136 Kan. 311, 15 P.2d 412 (1932); Woelk v. Consolidated School Dist., 133 Kan. 346, 299 Pac. 648 (1931); Purkeypyle v. School Dist. No. 101, 127 Kan. 751, 275 Pac. 146 (1929); Park v. McKinney, 121 Kan. 41, 245 Pac. 1021 (1926); Harkness v. School Bd., 103 Kan. 573, 175 Pac. 386 (1918); Hines v. Pulaski County Bd. of Educ., 292 Ky. 100, 166 S.W.2d 37 (Ct. App. 1942); Byrne v. Caldwell, *supra* note 29; Adams v. County Comm'rs, 180 Md. 550, 26 A.2d 377 (Ct. App. 1942); Wilson v. Brouder, 291 Mass. 389, 197 N.E. 26 (1935); Perszyk v. School Dist. No. 32, 212 Minn. 513, 4 N.W.2d 321 (1942); Bufkin v. Mitchell, *supra* note 29; State *ex rel.* Rice v. Tompkins, 239 Mo. App. 1113, 203 S.W.2d 881 (1947); State *ex rel.* Gastineau v. Smith, 196 S.W. 115 (Mo. Ct. App. 1917); State *ex rel.* Robinson v. Desonia, 67 Mont. 201, 215 Pac. 220 (1923); Peterson v. School Dist. No. 68, 124 Neb. 352, 246 N.W. 723 (1933); Berry v. School Bd., *supra* note 29; Fogg v. Board of Educ., *supra* note 29; McKnight v. Cassady, 113 N.J.L. 565, 174 Atl. 865 (Ct. Err. & App. 1934); Board of Educ. v. Atwood, 73 N.J.L. 315, 62 Atl. 1130 (1906), *aff'd*, 74 N.J.L. 638, 65 Atl. 999 (Ct. Err. & App. 1907); People *ex rel.* Bd. of Educ. v. Graves, *supra* note 29; Seiler v. Gelhar, *supra* note 29; Patton v. State, 14 Ohio Ct. App. 64 (1919); Consolidated School Dist. v. Union Graded School Dist., 185 Okla. 485, 94 P.2d 549 (1939); Reynolds v. Tankersley, 167 Okla. 425, 29 P.2d 976 (1934); Commissioner *ex rel.* Mellot v. Belfast Township School Dist., *supra* note 29; Jones v. Clifford Township School Directors, *supra* note 29; Commissioner *ex rel.* Houck v. Ferguson Township School Dist. 22 Pa. Dist. 592 (C.P. 1912); Commissioner v. Ferguson Township School Dist., 40 Pa. County Ct. 470 (C.P. 1912); Bacon v. Delmar Township School Directors, 16 Pa. Dist. 495 (1906); *In re* Lawrence Township School Direc-

pose and function contained in and underlying the constitutionality of the provision of transportation is that of effectuating the operation of the public educational process by making it available to those who without such transportation could not obtain it or would be seriously impaired in their ability to obtain it;[31] these decisions, either implicitly or explicitly, are grounded upon the recognition that the provision of transportation to public school students is constitutionally defensible as an administrative provision of the public educational system and a cost of the maintenance thereof.[32] Certain of the decisions in this area

---

tors, 32 Pa. County Ct. 665 (1906); Commissioner *ex rel.* Davis v. Girard Township School Directors, 15 Pa. Dist. 731 (C.P. 1905); Derichs v. Lake Creek School Dist., 57 S.D. 586, 234 N.W. 527 (1931); Cross v. Fisher, *supra* note 29; Town School Dist. v. Dempsey, 103 Vt. 481, 156 Atl. 387 (1931); Visser v. Nooksack Valley School Dist. No. 506, *supra* note 29; Hein v. Luther, *supra* note 29.

31. See, *e.g.*, Gould Special School Dist. v. Holdtorff, 171 Ark. 668, 285 S.W. 357 (1926); Pasadena City High School Dist. v. Upjohn, 206 Cal. 775, 276 Pac. 341 (1929); Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947); Schmidt v. Blair, 203 Iowa 1016, 213 N.W. 593 (1927); Gordon v. Wooten, 168 Miss. 717, 152 So. 481 (1934); Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913); State *ex rel.* Rice v. Tompkins, *supra* note 30; State *ex rel.* Gastineau v. Smith, *supra* note 30; Morfield v. Huddin, 131 Neb. 180, 267 N.W. 350 (1936); Fogg v. Board of Educ., 76 N.H. 296, 82 Atl. 173 (1912); People *ex rel.* Bd. of Educ. v. Graves, 243 N.Y. 204, 153 N.E. 49 (1926); *reversing* 215 App. Div. 744, 213 N.Y. Supp. 767 (1925); Hayes v. Benton, 193 N.C. 379, 137 S.E. 169 (1927); Board of Educ. v. Board of Educ., 126 Ohio St. 575, 186 N.E. 456 (1933); Board of Educ. v. Cox, 117 Ohio St. 406, 159 N.E. 479 (1927); Sommers v. Board of Educ., 113 Ohio St. 177, 148 N.E. 682 (1925); State *ex rel.* Keller v. Board of Educ., 11 Ohio Ct. App. 298 (1918); Carey v. Thompson, 66 Vt. 665, 30 Atl. 5 (1894); Gale v. School Dist. No. 4, 49 Wyo. 384, 54 P.2d 811 (1936).

32. Pasadena City High School Dist. v. Upjohn, *supra* note 31; Board of Pub. Instruction v. Kennedy, 109 Fla. 153, 147 So. 250 (1933); Malounek v. Highfill, 100 Fla. 1428, 131 So. 313 (1930); Fitzpatrick v. Johnson, 174 Ga. 746, 163 S.E. 908 (1932); Silver Lake Consol. School Dist. v. Parker, *supra* note 31; Bruggeman v. Independent School Dist. No. 4, 227 Iowa 661, 289 N.W. 5 (1939); Lanphier v. Tracy Consol. School Dist., 224 Iowa 1035, 277 N.W. 740 (1938); Dermit v. Sergeant Bluff Consol. Independent School Dist., 220 Iowa 344, 261 N.W. 636 (1935); School Dist. v. Atzenweiler, 67 Kan. 609, 73 Pac. 927 (1903); Squires v. Inhabitants of City of Augusta, 153 A.2d 80, 85 (Me. 1959); State *ex rel.* Kleimek v. School Dist. No. 70, 204 Minn. 279, 283 N.W. 397 (1939); Bufkin v. Mitchell, *supra* note 31; State *ex rel.* Lien v. School Dist. No. 73, 106 Mont. 223, 76 P.2d 330 (1938); McBride v. Reardon, 105 Mont. 96, 69 P.2d 975 (1937); People *ex rel.* Bd. of Educ. v. Graves, *supra* note 31; Rhynehart v. Spaulding, 137 Misc. 820, 244 N.Y. Supp. 569 (Sup. Ct. 1930), *aff'd*, 232 App. Div. 785, 249 N.Y. Supp. 897 (1931); Rysdam v. School Dist. No. 67, 154 Ore. 347, 58 P.2d 614 (1936); Haas v. Independent School Dist. No. 1, 69 S.D. 303, 9 N.W.2d 707 (1943); Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43 (1915); Beard v. Board of Educ., 81 Utah 51, 16 P.2d 900 (1932). See *In re* West Fallowfield School Dist., 29 Pa. County Ct. 600 (C.P. 1904); Dahl v. Independent School Dist. No. 2, 45 S.D. 366, 187 N.W. 638 (1922); see also Raybern Bus Service, Inc., 128 N.L.R.B. 430, 431 (1960) (dismissal of representation petition on ground that employer-transit company, en-

have further held,[33] and others have incidentally determined,[34] that the provision of transportation to school pupils is constitutionally supportable on the ground that such transportation involves the use of public funds for the benefit of private persons *only* because such transportation is a component part of the public educational process, constituting the implementation and exercise of that governmental function and public purpose embodied in the public school system.

In furtherance of that public purpose and function inherent in and obtaining from the diffusion of knowledge and intelligence, state legislatures, in compliance with constitutional mandates therefor, have established and maintained public educational systems and as a component part of such educational process have appropriated and expended public monies for the provision of transportation on this basis, the furnishing of publicly-financed transportation to those public school pupils in need of the same has withstood the objection that the provision of such transportation results in a private benefit to the recipients thereof and thus contravenes constitutional proscriptions against the appropriation and expenditure of public monies to, or for the benefit of, private individuals and institutions. When a child is placed in a private or parochial school, he is withdrawn from the public educational process embodied in the system of public schools provided by the state and becomes a part of a private educational process; in the provision of publicly-financed transportation for such a child, whether the same is viewed as a benefit to the private or parochial school involved or as a benefit to the child only, that public purpose supporting the constitutionality of furnishing transportation to public school students is not present and, it is submitted, that there then exists no constitutional defense against the contention that the pro-

---

gaged primarily in transporting school children, was not transit enterprise within Board's jurisdiction since engaged "primarily in aid of the State in the field of education").

33. Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913); Gurney v. Ferguson, 122 P.2d 1002 (Okla. 1941), *appeal dismissed*, 317 U.S. 588 (1942); Consolidated School Dist., No. 1 v. Wright, 261 Pac. 933 (Okla. 1927); Cross v. Fisher, *supra* note 32; Mitchell v. Consolidated School Dist. No. 201, 135 P.2d 79 (Wash. 1943).

34. See Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed*, 368 U.S. 517 (1962); Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947); School Dist. v. Atzenweiler, 67 Kan. 609, 73 Pac. 927 (1903); Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (Ct. App. 1942); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Haas v. Independent School Dist. No. 1, 69 S.D. 303, 9 N.W.2d 707 (1943); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962); State *ex rel.* Van Stratten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923).

vision of such transportation results in the use of public monies for private purposes or for the benefit of private individuals.[35]

II. CONSTITUTIONAL RESTRICTIONS UPON THE USE OF "EDUCATIONAL FUNDS"

That the provision of publicly-financed transportation to public school students constitutes an expenditure for educational purposes within the function of the state, and not primarily for the benefit of the individual recipients of such transportation, is reflected in those decisions upholding the use of funds constitutionally restricted to the maintenance and support of the state's free public schools as a source for the provision of such transportation.[36] These decisions, as well as those dealing with the provision of other aids and facilities to public school students,[37] demonstrate that the purpose and intendment of constitutional provisions, similar to those in Missouri,[38] securing the "inviolability" of public school funds against use for any purpose other than one consonant with the state's duty to provide a free public educational system, are two-fold: that is, to provide and maintain a permanent fund secure against change, reduction or legislative incursion and, equally important, to constitute a complete barrier against the diversion of educational funds to private and parochial schools and educational institutions, without impeding or limiting the power of the legislature to furnish through general legislation those facilities, aids and appurtenances necessary for and in aid of the public educational

---

35. See, *e.g.*, Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed*, 317 U.S. 588 (1942); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943).

36. See Board of Pub. Instruction v. Kennedy, 109 Fla. 153, 147 So. 250 (1933); Malounek v. Highfill, 100 Fla. 1428, 131 So. 313 (1930); Fitzpatrick v. Johnson, 174 Ga. 746, 163 S.E. 908 (1932); Dermit v. Sergeant Bluff Consol. Independent School Dist., 220 Iowa 344, 261 N.W. 636 (1935); Byrne v. Caldwell, 227 Ky. 59, 11 S.W. 2d 1004 (Ct. App. 1928); Dennis v. Wrigley, 175 Mich. 621, 141 N.W. 605 (1913); Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913); State *ex rel.* Lien v. School Dist. No. 73, 106 Mont. 223, 76 P.2d 330 (1938); McBride v. Reardon, 105 Mont. 96, 69 P.2d 975 (1937); Berry v. School Bd., 78 N.H. 30, 95 Atl. 952 (1915); Fogg v. Board of Educ., 76 N.H. 296, 82 Atl. 173 (1912); Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43 (1915); Beard v. Board of Educ., 81 Utah 51, 16 P.2d 900 (1932); Carey v. Thompson, 66 Vt. 665, 30 Atl. 5 (1894).

37. See Macmillan Co. v. Clarke, 184 Cal. 491, 194 Pac. 1030 (1920); Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Bathgen v. Reorganized School Dist., 365 Mo. 518, 284 S.W.2d 516 (1955); Affholder v. State, 51 Neb. 91, 70 N.W. 544 (1897).

38. Mo. CONST. art. IX, §§ 3, 5. See LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 385-87 (2d ed. 1959).

process.[39] These decisions, and others,[40] have concluded that the net effect of constitutional provisions assuring a permanent "school fund" and proscribing the use of public school funds for any purpose other than the support and maintenance of the public school system, is to prohibit the use of any funds appropriated for educational purposes, whether drawn from the permanent school fund or from general revenue for purposes other than the public educational system and to interdict against the diversion of such educational funds to private or parochial schools,[41] notwithstanding the fact that in some instances payment from such funds to privately owned and operated educational institutions may result in benefits to public school students.[42] The decisions in this area demonstrate that the cumulative effect of constitutional provisions providing for, and restricting the use of, "educational funds" is to assure the facilitation of the public educational process and to incorporate into and apply to that process the principle of separation of church and state; upon this basis, courts have invalidated the provision of transportation to parochial school students, holding that a transportation fund, whether appropriated from the permanent "school fund" or from general revenue, constitutes the appropriation of public money for educational purposes within the constitutional proscription against the diversion of educational funds to private or parochial schools.[43]

39. See Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Wright v. School Dist. No. 27, 151 Kan. 485, 99 P.2d 737 (1940); Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (1942); Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Opinion Of The Justices, 214 Mass. 599, 102 N.E. 464 (1913); Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913); Otken v. Lamkin, 56 Miss. 758 (1879); State *ex rel.* Pub. School Dist. v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932); Rutgers College v. Morgan, 70 N.J.L. 460, 57 Atl. 250 (Sup. Ct. 1904), *aff'd*, 71 N.J.L. 663, 60 Atl. 205 (Ct. Err. & App. 1905); Jernigan v. Finley, 90 Tex. 205, 38 S.W. 24 (1896); Carey v. Thompson, 66 Vt. 665, 30 Atl. 5 (1894).

40. State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934), *writ of error dismissed on other grounds*, 39 Del. 187, 197 Atl. 478 (1938); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891).

41. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed*, 368 U.S. 517 (1962); State *ex rel.* Traub v. Brown, *supra* note 40; Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Sherrard v. Jefferson County Bd. of Educ. 294 Ky. 469, 171 S.W.2d 963 (Ct. App. 1942); Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Opinion Of The Justices, 214 Mass. 599, 102 N.E. 464 (1913); Judd v. Board of Educ., *supra* note 40; State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

42. See, *e.g.*, Knowlton v. Baumhover, *supra* note 41; Williams v. Board of Trustees, *supra* note 41; Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891).

43. See State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934), *writ of error dismissed on other grounds*, 39 Del. 187, 197 Atl. 478 (1938);

The need for a free public school system was not universally recognized throughout the United States until the middle of the 19th century,[44] and the provision of a public educational process is reflected in constitutional provisions relating to the same; thus, it has been stated,[45] that the movement toward the establishment and maintenance of the public educational process caused the necessity for constitutional amendments and revisions, increasingly detailed in nature, in order to specifically apply that principle of the separation of church and state, already extant with regard to governmental matters, to education. That this is the case is reflected in the historical development of constitutional amendments and revisions in Missouri.[46] The constitution of 1865 contained provisions setting aside a special "school fund" and restricting the use of that fund and the income thereof to the support and maintenance of the free public schools only;[47] those provisions enunciating the principle of separation of church and state in governmental matters contained in the prior constitution,[48] which incidentally contained no provision for the public schools, were generally rephrased and reiterated.[49] It was the purpose of such first "inviolability" provisions to assure the existence of a permanent source of support for the free public schools safeguarded against legislative trespass or incursion for any other purpose whatever and such provisions were apparently included with the thought that the only public monies available for the support of the free public educational process would be derived from this constitutionally protected fund.[50] The subsequent realization that those funds necessary for the support and maintenance of public schools and the effectual facilitation of the public educational process could not be supplied from the

Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); see also, Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (Ct. App. 1942); Haas v. Independent School Dist. No. 1, 69 S.D. 303, 9 N.W.2d 707 (1943).

44. See 1 C. & M. BEARD, THE RISE OF AMERICAN CIVILIZATION 809-18 (1927); CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 118-19 (1919); LA NOUE, *op. cit. supra* note 11, at 12-14; MOEHLMAN, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 132-35 (1951).

45. La Noue, *op. cit. supra* note 11, at 13.

46. For an excellent treatment of constitutional developments in Missouri, see THE STATE HISTORICAL SOC'Y OF MO., JOURNAL, MISSOURI CONSTITUTIONAL CONVENTION OF 1875 (2 vols., 1921).

47. MO. CONST. art. IX, § V (1865).

48. MO. CONST. art. XIII, §§ 4, 5 (1820).

49. MO. CONST. art. I, §§ X, XI (1865).

50. See Vols. 1 and 2 THE STATE HISTORICAL SOC'Y OF MO., *op. cit. supra* note 46, at 187, 207, 526, 586–88 and 717; see Bathgen v. Reorganized School Dist., 365 Mo. 518, 284 S.W.2d 516 (1955); Lincoln Univ. v. Hackmann, 295 Mo. 118, 243 S.W. 320 (1922); see also, Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. 1961); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959).

permanent school fund resulted in the necessity of recourse to the state's general revenues derived from its powers of taxation.[51] Also, in order to give to those educational funds drawn from the general revenue that constitutional protection afforded by the limitations upon the permanent school fund, constitutional provisions setting forth the principle of separation of church and state in governmental matters were added to and included within the article dealing with education.[52]

51. The decision in Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed*, 368 U.S. 517 (1962), is much in point with regard to the historical perspective surrounding the development toward the appropriation of tax-raised funds for educational purposes from general revenues. In that case, the court had occasion to consider the validity of a statute authorizing transportation of parochial school pupils on the same terms and conditions as those upon which conveyance was afforded to public school students in connection with the fundamental law in the Territory of Alaska prior to statehood (48 U.S.C. § 21-486). In considering the proscriptions of that provision inhibiting the use of "any public money" for the support or benefit of any sectarian or denominational school or any school not under the exclusive control of the government, the court pointed out that Alaska's provision with regard to the educational field was enacted in a modern context at a time when it was clear that a special fund and the income therefrom could not provide sufficient monies for the support of the free public schools and, therefore, that there was no distinction between general funds and funds for the support of the free public schools, the proscription being directed against the use of "any public money." Thus, the court concluded that Alaska's basic law contained in one provision that which is necessarily extant in one or more constitutional provisions in other state constitutions, that is, an interdiction against the use of any public funds, appropriated for educational purposes, to aid, benefit or support any school system or school other than that system and those schools which it is the state's constitutional duty to maintain and support.

52. See MO. CONST. art. IX, § 8 and the constitutional predecessor thereof MO. CONST. art. XI, § 11 (1875). The debates at the constitutional convention, 1943-44, are of particular significance in this regard (page references used hereinafter in this footnote are to the pages of the typewritten debates of the constitutional convention of 1943-44 which are the property of the Law Library Association of St. Louis). During the debates, a proposal that the sections dealing with the separation of church and state (MO. CONST. art. I, §§ 6, 7) be combined into one section was discussed; after lengthy debate regarding phraseology and the fact that certain difficulties could arise from such a combination (pp. 1502-06), the following was pointed out:

> MR. DAMRON: Mr. President and Members of the Convention, the substitute section to restore Sections 6 and 7 of the present Constitution. Mr. Kehr and I appointed on a sub-committee of the Bill of Rights Committee to consider Sections 5 to 20, I believe at least Sections 7 and 8, were a part of the Article referred to us. The first part of Section 7 of the present Constitution provides that no money shall be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion or in aid of any priest, minister, preacher or teacher thereof as such. *Now there is a similar section in the article on Education.* Page 92, this Constitution of Missouri, Section 11, says "neither the General Assembly nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in the aid of any religious creed, church or sectarian purpose,' and so forth. Mr. Kehr and I, when we reported to our Committee, suggested that the first clause of Section 7 of the Bill of Rights be referred to

This purposeful incorporation into and application of the principle of the separation of church and state in the area of education, contained in article IX, section 8 of the present constitution[53] is strong support

---

the Education Committee that we might consider combining, putting Section 11 under the article of Education and the first part of Section 7 in the Bill of Rights *since they both restricted against the use of public money to aid any school, church or anything of that kind.* The Education Committee did not accept the suggestion and referred the matter back to the Bill of Rights Committee and, so the report came in in the form that Mr. Marr has submitted. They're seeking to combine those two sections, 7 and 8. Now, those two sections deal with different subjects. Section 7 restricts against the taking of money from the public treasury, directly or indirectly in aid of any church, sect, denomination of religion and so forth. Whereas, Section 6, directed to the protection of the rights of individuals, says, 'no person can be compelled to erect, support or attend any place or system of worship or to maintain or support any priest, minister, teacher,' and so forth. Section 6 protects the rights of individuals. *Section 7 is designed to protect public monies against being used for religious purposes.* Now, I think the two sections, the two old sections ought to be restored in the Constitution because they are very important sections, *7 especially,* I think is very important *because it is the one that protects (against) the misuse of public funds for religious purposes.* Id. at 1506. (Emphasis added.)

After a further discussion, the sections referred to above were adopted as separate provisions rather than in the combined form initially proposed (pp. 1506-07). Subsequently, during the discussion on provisions for inclusion in the article on education, there was an occasion for the convention to deal with that provision proscribing the use of public funds for religious purposes which is parallel with the section 7 referred to in the above discussion, that is, section 8 to which Mr. Damron referred; that provision is included in the present article on education (MO. CONST. art. IX, § 8). There was a general discussion with regard to the fact that the proposed section (based on MO. CONST. art. XI, § 11 (1875)) was parallel with that contained in the Bill of Rights precluding the use of public money, "directly or indirectly," in aid of any church, sect or denomination of religion (pp. 2426-28) and in this connection, the following was pointed out:

MR. PHILIPS (of St. Louis City): I notice, Mr. Lindsay, that this Section . . . contains a great many of the provisions that were adopted by this Convention in the File on the Bill of Rights . . .
MR. LINDSAY: Well, the Bill of Rights section pertains generally to the expenditure of funds for religious purposes. *This pertains to schools.*
MR. PHILIPS (of St. Louis City): Do you think it ought to be in this File *as well as in the Bill of Rights?*
MR. LINDSAY: Yes, *the Committee discussed the Bill of Rights and felt that this should be in this article.* (Emphasis added.)

53. MO. CONST. art. IX, § 8 provides:

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from *any public fund* whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever. (Emphasis added.)

Compare the above with the provisions of MO. CONST. art. I, § 7, which states:

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

for the conclusion that any public funds appropriated for educational purposes, whether the same be drawn from the permanent school fund[54] or from general revenues, are constitutionally limited to the support and maintenance of the free public school system and circumscribed by proscriptions against the diversion thereof for any purpose other than the facilitation and effectuation of the public educational process.[55]

---

sect or creed of religion, or any form of religious faith or worship. (Emphasis added.)

54. MO. CONST. art. IX, §§ 3, 5.

55. The few decisions in Missouri dealing with this general area have held that MO. CONST. art. IX, § 8 has a separate and distinct meaning and that the intendment of it is to establish the absolute separation of church and state in the educational area similar to that separation enjoined and declared in the Bill of Rights, MO. CONST. art. I, § 7. Thus, in Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1941), the court referred to the constitutional predecessor of the present article IX, Section 8 and held that that provision precluded a school district from making payments from *any public fund* to sustain any private or public school controlled by any sectarian denomination and therefore, that when the school district in question utilized public funds to help support a school influenced by sectarian interests it violated that constitutional proscription. The court further indicated that this constitutional precursor of the present article IX, Section 8 related specifically to the educational area and was separate and distinct from that provision contained in MO. CONST. art II, § 7 (article I, § 7 of the present constitution) prohibiting the use of any money from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion. The court concluded that the constitutional policy of the State of Missouri decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well and that *any public money* coming from taxpayers of every denomination, cannot be used for the aid or support or the help of any religious sect *in education* or otherwise. That the import and intendment of article IX, Section 8 were to assure the separation of church and state *in educational matters* was reaffirmed in the decision in Berghorn v. Reorganized School Dist. No. 8, 364 Mo. 121, 260 S.W.2d 573 (1953). In that case, the court enjoined the defendant school board from contributing to the maintenance and operation of a school in which it was found that certain sectarian interests had gained control. The court held that the presence of such sectarian features destroyed the free public character of the school in question thus rendering it ineligible for support from public funds or by public authority; the court's injunction precluded the use of *any* public fund or money for such purpose. The decision turned upon a construction of MO. CONST. art. I, §§ 5-7 (providing for the exercise of freedom of religion and proscribing the establishment of any church or sect) and the provisions of MO. CONST. art. IX, § 8. In connection with this construction and the interrelationship of these provisions, the court concluded that the State of Missouri had expressed herein its definite policy to maintain free public schools and a public school system separate and apart from all religious or sectarian activities in order to assure absolute freedom of religion. This court, in construing the relation of article IX, Section 8 with that established policy, held that *no* public funds or properties, either directly or indirectly, could be used to support or sustain any school affected by religious influences or teachings or conducted in such a manner as to influence or predispose a school child to the acceptance of any particular re-

In *McVey v. Hawkins*,[56] the court neither considered nor passed upon the provisions of article IX, section 8 but limited its inquiry to the restrictive effect of those constitutional provisions[57] establishing a permanent public school fund and restricting the use thereof to the establishment, maintenance and support of the public school system. The court, in holding that the expenditure from the permanent school fund to provide transportation for public and parochial school students transgressed constitutional restrictions limiting the use of that fund only insofar as that expenditure resulted in the transportation of parochial school students, of necessity recognized that the provision of transportation for the public school students there involved was a proper expenditure for those educational purposes to which the use of the permanent school fund is constitutionally limited.[58] In thus indicating that the expenditure of the permanent school fund for the providing of transportation to public school students constitutes an appropriation for educational purposes within the constitutional strictures upon the use of that fund, it is submitted that the Court did not leave open the availability of recourse to general revenues for the provision of transportation to non-public school students, but merely expressed its unwillingness to confront the issue of separation of church and state posed by predicating its decision on constitutional provisions not requiring such confrontation. Logical analysis of those constitutional proscriptions contained in Article IX, Section 8 demonstrates that the intendment thereof is to restrict the use of *any* public monies *appropriated for educational purposes* to the public school system and to preclude the diversion of any educational funds to purposes other than the public educational process. To construe the prohibitions of Article IX, Section 8 as applicable only to the permanent "school fund" would render its inclusion in the constitutional scheme, and particularly in that portion thereof designated "Education," of no effect; the untenability of such a construction is clearly demonstrated in *Matthews v.*

---

ligion or religious belief; citing the decision in the *Harfst* case, the court held that the school in question could not constitutionally be supported by public school moneys *or any public funds.*

56. 364 Mo. 44, 258 S.W.2d 927 (1953).

57. See note 6 *supra* and accompanying text.

58. In the *McVey* case, the court's injunction was directed only against the use of the permanent school fund for the provision of transportation to the parochial school pupils there involved. The court did not find any constitutional transgression in the utilization of the permanent school fund for the transport of public school students, the court stating:

> We . . . hold that the public school funds used to transport the pupils part way to and from . . . [parochial schools] . . . are not used for the purpose of maintaining free public schools and that *such use* of said funds is unlawful. It necessarily follows that such transportation of *said students* at the expense of the district is unlawful and must be enjoined. 258 S.W.2d 927, at 933-34. (Emphasis added.)

Quinton[59] discussing, in part, the historical genesis of the permanent school fund and the development of constitutional restrictions against the use of any funds appropriated for educational purposes for anything other than the establishment and maintenance of the public school system.[60] In construing the provisions assuring the existence of a permanent school fund together with those constitutional proscriptions contained in Section 8, it cannot be contended that any public funds appropriated for educational purposes, whether derived from the permanent "school fund" or from general revenue, can be used for purposes other than effectuation and facilitation of the public school system; through such construction, it has been held that the intendment of constitutional limitations upon the use of, and constitutional proscriptions against the diversion of, any fund appropriated for educational purposes, regardless of its source, is to incorporate the doctrine of the separation of church and state in the educational sphere, thus assuring the maintenance of the public school system thoroughly separate and distinct from any sectarian school or influence.[61] On this basis, it has been held that "educational funds" are not lawfully ex-

59. 362 P.2d 932 (Alaska 1961), *appeal dismissed*, 368 U.S. 517 (1962).

60. In the *Matthews* case, the Court commented on those decisions which had upheld the provision of publicly-financed transportation to parochial school students on the ground that the source of appropriations for such transportation was the state's general revenue and that all "educational monies" were not constitutionally inhibited in the same respect as the permanent school fund. The Court indicated that those decisions, in distinguishing between monies appropriated for educational purposes from the public or permanent school fund and those appropriated from general revenue had lost sight of historical perspective in that recourse to the state's general revenues, in addition to utilization of the permanent school fund, when the same became necessary, was constitutionally maintainable only because in furtherance of the state's duty to support and maintain the public school system. Thus, the Court concluded that any funds appropriated for "educational purposes," whether drawn from a permanent school fund or from general revenue, were constitutionally committed to the support and maintenance of the free public schools and constitutionally inhibited against diversion for any other purpose.

61. See State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934), *appeal dismissed on other grounds*, 39 Del. 187, 197 Atl. 478 (1938); Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Smith v. Donahue, 195 N.Y. Supp. 715, 202 App. Div. 656 (1922); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed*, 317 U.S. 588 (1942); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890). See also Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947); Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (1942); Trustees of Rutgers College v. Morgan, 70 N.J.L. 460, 57 Atl. 250 (Sup. Ct. 1904), *aff'd*, 71 N.J.L. 663, 60 Atl. 205 (Ct. Err. & App. 1905); Haas v. Independent School Dist. No. 1, 69 S.D. 303, 9 N.W.2d 707 (1943); State *ex rel.* Van Stratten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923).

pended in the provision of transportation,[62] secular textbooks[63] and other educational aids[64] to private and parochial school students or where the result of such expenditure is to divert such funds to schools or institutions of learning controlled by sectarian or private interests.[65]

III. POWERS OF AND RESTRICTIONS UPON THE STATE IN THE FIELD OF EDUCATION

The often-made contention[66] that since the state has imposed upon its citizenry the duty to obtain an education meeting certain prescribed standards, tax-raised funds may constitutionally be appropriated and expended in furnishing transportation to private and parochial school students in order to assist them in the fulfillment of that obligation, does not take cognizance of those principles and precepts embodied in constitutional proscriptions against the use of public funds for the benefit of individuals.[67] Noting that the provision of transportation to school is only constitutionally defensible as an incident to, and an

62. State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941); See Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 29 N.E.2d 214 (1947) (implied); Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (dictum); School Dist. of Robinson Township v. Houghton, 387 Pa. 236, 128 A.2d 58 (1956) (implied); State *ex rel.* Van Stratten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923) (implied).

63. Smith v. Donahue, 195 N.Y. Supp. 715, 202 App. Div. 656 (1922); Haas v. Independent School Dist. No. 1, 69 S.D. 303, 9 N.W.2d 707 (1943).

64. See Otken v. Lamkin, 56 Miss. 758 (1879); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Stein v. Brown, 125 Misc. 692, 211 N.Y. Supp. 822 (Sup. Ct. 1925).

65. See Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

66. See Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed,* 368 U.S. 517 (1962); Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947); Squires v. Inhabitants of City of Augusta, 155 Me. 151, 153 A.2d 80 (1959); Adams v. County Comm'rs, 180 Md. 550, 26 A.2d 377 (Ct. App. 1942); Board of Educ. v. Wheat, 174 Md. 314, 199 Atl. 628 (Ct. App. 1938); Quinn v. School Comm., 332 Mass. 410, 125 N.E.2d 410 (1955); Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So. 706 (1941); Everson v. Board of Educ., 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944), *rev'd,* 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945), *aff'd on other grounds,* 330 U.S. 1 (1946); Dickman v. School Dist. No. 62C, 223 Ore. 347, 366 P.2d 533 (1961), *cert. denied,* 371 U.S. 823 (1962); School Dist. of Robinson Township v. Houghton, 387 Pa. 236, 128 A.2d 58 (1956); Haas v. Independent School Dist. No. 1, 69 S.D. 303, 9 N.W.2d 707 (1943); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); Mitchell v. Consolidated Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

67. See notes 12-14 *supra* and text supported thereby.

integral part of, that public purpose and function embodied in the public school system, many courts have squarely rejected,[68] and others have indicated the invalidity of,[69] that argument. The fallacy of this contention is further explicated when those decisions dealing with the powers of the state in the field of education, and the restrictions upon the exercise of those powers, are examined.

The power of the state to protect and perpetuate itself and its institutions by requiring the education of its youth is exercisable in a broad range, both with regard to the nature of the education required and with regard to the state's ability to supervise and regulate all schools, both public and private.[70] The broad discretion of the state in the field of education, however, must be exercised within the limits of state constitutional provisions and state school legislation[71] and, moreover, cannot contravene those rights of parents and guardians with regard to the rearing of their children and wards, the exercise of which is within those freedoms and liberties protected against state infringement by the Fourteenth Amendment of the Constitution of the United States.[72]

With particular reference to those rights of parents and guardians concerning the education of their children and wards, the Supreme Court of the United States held in *Pierce v. Society of Sisters*[73] that such rights are within the protection of the due process clause and that the state, as *parens patriae,* cannot unreasonably interfere therewith by taking hold of the child during its minority for purposes of

68. Visser, v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943); and see, Dickman v. School District No. 62C, 223 Ore. 347, 366 P.2d 533 (1961) (textbooks), *cert. denied,* 371 U.S. 823 (1962).

69. See, Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed,* 368 U.S. 517 (1962); Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947); School Dist. of Robinson Township v. Houghton, 387 Pa. 236, 128 A.2d 58 (1956); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

70. See Farrington v. Tokushige, 273 U.S. 284 (1927); Bartels v. Iowa, 262 U.S. 404 (1923); Waugh v. Board of Trustees, 237 U.S. 589 (1915); People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Commonwealth v. Roberts, 159 Mass. 372, 34 N.E. 402 (1893); State v. Johnson, 188 N.C. 591, 125 S.E. 183 (1924); State v. Jackson, 71 N.H. 522, 53 Atl. 1021 (1902); Parr v. State, 117 Ohio St. 23, 157 N.E. 555 (1927); Leeper v. Smith, 103 Tenn. 500, 53 S.W. 962 (1899); Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926).

71. See State *ex rel.* Clark v. Haworth, 122 Ind. 462, 23 N.E. 946 (1890); Dritt v. Snodgrass, 66 Mo. 286 (1877).

72. See School Dist. of Abington Township v. Schempp (Murray v. Curlett), 83 Sup. Ct. 1560 (1963); Engel v. Vitale, 370 U.S. 421 (1962); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Farrington v. Tokushige, 273 U.S. 284 (1927); Meyer v. Nebraska, 262 U.S. 390 (1923).

73. 268 U.S. 510 (1925).

fostering, protecting and educating the child. This decision, which involved no issue of freedom of religion,[74] determined that the state cannot foreclose the right of parents and guardians to choose a system of instruction for their children and wards other than that system established and maintained by the state; although framed in terms of due process, the Court's conclusion is no more than a reaffirmation of that fundamental concept that the child is not the mere creature of the state and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[75] This basic recognition, that absent particular circumstances,[76] the welfare and care of children are the responsibility of, and entrusted in, their parents and not the state is reflected in those decisions holding that in matters of education the state must remain completely neutral and cannot, on the basis of its interest in the care and welfare of children, require that a particular curriculum be laid down or that particular studies be taught where such requirements result in a deprivation of those rights of parents protected by the due process clause.[77]

74. In the *Pierce* case, a parochial school and a privately owned and operated non-sectarian military academy challenged state legislation requiring all children between certain ages to attend the public schools, contending that such legislation was invalid as an arbitrary and unreasonable interference with the private property rights of the schools and with the liberty of parents to determine that method of instruction desired by them for their children. The court, in holding that the state legislation was invalid as an unreasonable deprivation of the private property rights of the schools' owners, also found that the due process guarantees of the Fourteenth Amendment excluded any power of the state to standardize children by forcing them to accept instruction in the public school system only.

In connection with the disparate treatment given to the decision in *Pierce*, *compare* the statement of Mr. Justice Brennan with reference to that case that "while one of the plaintiffs was indeed a parochial school, the case obviously decided no First Amendment question but recognized only the constitutional right to establish and patronize private schools—including parochial schools—which meet the state's reasonable minimum curricular requirements." [*School Dist. of Abington Township v. Schempp*, 83 Sup. Ct. 1560, at 1585 (1963) (concurring opinion)], *with* that of Mr. Justice Stewart that "It has become accepted that the decision in *Pierce v. Society of Sisters* . . . upholding the right of parents to send their children to nonpublic schools, was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation." [*Id.* at 1619 (dissenting opinion)].

75. Pierce v. Society of Sisters, *supra* note 73, at 535.

76. See, *e.g.*, decisions dealing with the commission of juvenile delinquents to state schools and compelling them to submit to the curriculum there laid down, *Ex parte* Sharp, 15 Idaho 120, 96 Pac. 563 (1908); People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870); State *ex rel.* Cave v. Tincher, 258 Mo. 1, 166 S.W. 1028 (1914).

77. The doctrine of *Meyer v. Nebraska*, 262 U.S. 390 (1923), that the due process clause of the Fourteenth Amendment protects against unreasonable interference with the liberty of parents and guardians to direct the upbringing and

The public educational system constitutes a governmental function undertaken by the state and premised upon the public purpose subserved thereby; as a part of that public educational system, the state, under specified conditions, has provided for publicly-financed transportation. The providing of such transportation to public school students has been sustained, not on the ground that the state stands as *parens patriae* in caring for and protecting the welfare of children enrolled in the public school system, but as a valid administrative provision effectuating the operation of the public educational process by making that process available to those who without such transportation could not obtain it.[78] The state, as *parens patriae,* cannot preclude parents from choosing programs of education for their children other than that public system of education maintained by it; when such other programs of instruction are chosen, it is submitted that the state cannot, as *parens patriae,* provide the means of participating in such private educational processes by assuming and taking over the responsibility of parents for the transportation of their children.[79]

IV. CONSTITUTIONAL RESTRICTIONS UPON THE STATE'S ABILITY TO "PROMOTE THE GENERAL WELFARE"

The fundamental law of the state, set forth in the provisions of its constitution, restricts and limits the powers of the state to act; within the interstices of these restrictions and limitations, and in harmony with them, the state is empowered to provide for and promote the general welfare of its inhabitants through the exercise of its police power.[80] The state, by declaring that it is thereby promoting the

education of children under their control is reflected in the decision in *Pierce v. Society of Sisters* and has been consistently followed by the United States Supreme Court; see, *e.g.,* School Dist. of Abington Township v. Schempp, (Murray v. Curlett), 83 Sup. Ct. 1560 (1963); Engel v. Vitale, 370 U.S. 421 (1962); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Farrington v. Tokushige, 273 U.S. 284 (1927); Bartels v. Iowa, 262 U.S. 404 (1923).

78. See notes 31 and 32 *supra* and text supported thereby.

79. See, *e.g.,* Board of Educ. v. Wheat, 174 Md. 314, 327-33, 199 Atl. 628, 634-36 (Ct. App. 1938) (dissent of Parke, J.). See also Board of Educ. for Ind. School Dist. No. 52 v. Antone, 384 P.2d 911, 913 (Okla. 1963):

> The law leaves to every man the right to entertain such religious views as appeal to his individual conscience, and to provide for the religious instruction and training of his children to the extent and in the manner he deems essential or desirable. When he chooses to seek for them educational facilities which combine secular and religious instruction, he is faced with the necessity of assuming the financial burden which that choice entails.

80. See Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911); Wright v. Hart, 182 N.Y. 330, 75 N.E. 404 (1905); Colon v. Lisk, 153 N.Y. 188, 47 N.E. 302 (1897); Stein v. Brown, 125 Misc. 692, 211 N.Y. Supp. 822 (Sup. Ct. 1925); St. Patrick's Church Soc'y v. Heermans, 68 Misc. 487,

health, welfare and safety of its inhabitants, cannot exceed or transgress those strictures upon its ability to act contained in its constitution.[81] Among the more controversial of these inhibitions upon state activity are those provisions contained in the overwhelming majority of state constitutions,[82] and in the Constitution of Missouri,[83] interdicting state interference with religion through restrictions upon its exercise and aid or support of it. Equally important, although apparently less controversial, is that fundamental constitutional proscription against the use of public monies for other than public purposes,[84] for in those controversies involving the application of the principle of the separation of church and state to the area of education, this concept has proved to be a most important but inadequately analyzed underlying issue.

The fallacy inherent in the consideration of the question of the existence of a public purpose as one separate and distinct from the question of whether a particular expenditure of public monies contravenes constitutional proscriptions against aid or support to sectarian interests and institutions is reflected in many of the decisions dealing with the constitutionality of furnishing publicly-financed transportation to parochial and private school pupils. Those decisions which have invalidated the providing of such transportation on the ground that the benefit of the expenditure involved inures to the private or parochial school attended by the pupils for whom such transportation is provided[85] would, if their reasoning were carried to its logical extreme, invalidate all appropriations of public funds where it is shown that the expenditure thereof results in an aid or benefit

---

124 N.Y. Supp. 705 (Sup. Ct. 1910); State *ex rel.* Richey v. Smith, 42 Wash. 237, 84 Pac. 851 (1906).

81. Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55 (1937); City of Parkersburg v. Brown, 106 U.S. 487 (1883); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875); Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed,* 368 U.S. 517 (1962); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Board of Educ. for Ind. School Dist. No. 52 v. Antone, 384 P.2d 911 (Okla. 1963); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed,* 317 U.S. 588 (1942); Dickman v. School Dist. No. 62C, 223 Ore. 347, 366 P.2d 533 (1961), *cert. denied,* 371 U.S. 823 (1962); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

82. See Legislative Drafting Research Fund of Columbia University, *Index Digest of State Constitutions* 369, 376, 380, 904-08 (2d ed. 1959); La Noue, *Decision for the Sixties: Public Funds for Parochial Schools?* 14 n. 40 (Department of Religious Liberty, National Council of Churches 1963).

83. MO. CONST. art. I, §§ 5-7; art. IX, § 8.

84. See notes 13 and 14 *supra* and text supported thereby.

85. State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934), *appeal dismissed on other grounds,* 39 Del. 187, 197 Atl. 478 (1938); Judd

to sectarian interests or religious institutions. Thus, to use those often-cited classic examples,[86] the providing of fire and police protection or any of the other utility services furnished to the community at public expense would, by carrying this line of reasoning to its logical extreme, be constitutionally invalid, since churches, parochial schools and other sectarian institutions and interests would receive a benefit from the expenditure of public funds involved in the providing of such services. On the other hand, those decisions which have sustained the validity of legislation providing publicly-financed transportation to private and parochial students through acceptance of legislative declarations that the promotion of education and the protection of school children is promoted thereby, which acceptance has often been based upon that judicial proclivity to find a statute constitutional whenever possible,[87] have held that such legislation does not contravene those

v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

86. See, *e.g.*, Everson v. Board of Educ., 330 U.S. 1, 17-18 (1946); Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1961); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed*, 317 U.S. 588 (1942); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198; State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

87. See, *e.g.*, Adams v. County Comm'rs, 180 Md. 550, 26 A.2d 377 (Ct. App. 1942); Board of Educ. v. Wheat, 174 Md. 314, 199 Atl. 628 (Ct. App. 1938). In the *Wheat* case, the court upheld the constitutionality of a statute providing for utilization of public school transportation facilities for the conveyance of private and parochial school pupils to that public school nearest to the non-public school attended by the particular pupil involved, rejecting the contentions that such provision constituted the use of public funds for a private purpose, that the expenditures necessarily incurred by the extra expense of transporting non-public school pupils constituted a violation of the constitutional proscription against incursions upon the permanent school fund and, that such appropriation would constitute a contribution to a place of worship in contravention of constitutional provisions precluding such contributions. In sustaining the legislation's validity, the court adverted to the fact that public school transportation was extended only to overcome the disadvantage of distance for many pupils resulting as a consequence of the consolidation of schools but stated that that purpose did not prevent public utilization of any further advantages that might accrue from the use of the transportation system; thus, the court held that since the purpose of protection against traffic hazards was a *possible one*, the legislation should not be regarded as a provision for the supplying of public school facilities to private and parochial school pupils. The court stressed the interest of the state in seeing to it that all children of school age acquired an education by attending some school and that under compulsory education laws attendance at an accredited private or parochial school was satisfactory; thus, the court concluded that the accommodation of non-public school pupils in public school buses "appeared" to be within the proper limits of enforcement of the duty of compulsory education imposed by the state and held,

constitutional strictures against the use of state power or public monies to aid or support sectarian interests and institutions;[88] the reasoning of these decisions, when logically extended, would support the providing of crayons, pens, pencils, stationery, maps, charts, the building and furnishing of schoolhouses and even the employment of teachers, on the theory that the benefit obtained thereby results in the promoting of education or the care or protection of school children. Decisions based on either of these two lines of reasoning, although reaching opposite conclusions, support the proposition that public monies and state power cannot constitutionally be used in aid of or

---

Even though the statute ordering it may be open to another interpretation, *if the transportation with this object is a constitutional action,* the statute must be construed as having the object, because *the Court is required to admit the constitutionality of an act . . . if it can be brought within the exercise of any constitutional power. Id.* at 322-23, 199 Atl. at 632. (Emphasis added.)

The decision in the *Wheat* case was followed and reaffirmed in the *Adams* case where the legislation involved was considerably different from that under consideration in the *Wheat* decision. *In Adams,* the court sustained the constitutionality of legislation providing a public fund to be used to reimburse parochial schools, owning their own buses and transporting their pupils, for expenses incurred in such transportation, payments being based on the proportion of miles travelled by various buses under contract with each school. In rejecting the contention that the statutory provision in question constituted the appropriation of public funds for private purposes, the Court cited *Wheat* as controlling and stated,

> It is usually held that the furnishing of transportation to children of parochial schools is . . . an appropriation of public funds to private purposes. . . . Those courts have construed the aid to have been given to the schools rather than to the children in attending some school, while the view taken in the *Wheat* case was that *it could have been the design* of the General Assembly in the statute considered to give aid and protection to the children on the highways, or to facilitate the compulsory attendance at some school, and that the *possibility of this design* prevented holding the enactment unconstitutional. . . . *Id.* at 556, 26 A.2d at 380. (Emphasis added.)

The court also rejected the contention that under the legislation the county commissioners were authorized to turn public money over to parochial schools, the court indicating that if it was valid for the county to convey non-public school children, the fact that the county commissioners joined with the non-public schools in affording such transportation appeared equally well founded in principle and free from objections; in this connection, the court stated,

> This last consideration *seems,* too, to support the action against constitutional objections. If the county's carrying the children of parochial schools by any means is a valid action, as we have decided in the *Wheat* case, one not necessarily to be considered a gift to the schools, the joining with the schools in supporting facilities already provided *would seem valid.* The decision in the *Wheat* case that the public funds may be expended to aid the children *appears to validate* the action questioned in this one. *Id.* at 556, 26 A.2d at 380. (Emphasis added.)

88. Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed,* 365 U.S. 299 (1961); Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945); Everson v. Board of Educ., 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945), *reversing* 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944), *aff'd,* 330 U.S. 1 (1947).

support to sectarian interests and institutions; their unity in disharmony results from the failure to recognize that where a public purpose actually exists, the fact that private persons or sectarian interests and institutions benefit from the appropriation and expenditure of public monies in the exercise of that public function is immaterial.[89]

The failure to recognize the basic proposition that the constitutionality of a particular expenditure of public monies does not turn upon the nature or character of the recipient of the benefit of such expenditure, but upon the purpose of the payment, is apparent in those decisions which have invalidated the providing of publicly-financed transportation or other "educational" aids to private and parochial school pupils on the ground that such provision constitutes a benefit, directly or indirectly, to the private or parochial school itself in contravention of constitutional proscriptions against such assistance.[90] This failure

89. See footnotes 14-16 *supra* and text supported thereby.

90. State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934), *appeal dismissed on other grounds*, 39 Del. 187, 197 Atl. 478 (1938); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Smith v. Donahue, 202 App. Div. 656, 195 N.Y. Supp. 715 (1922); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962); See School Dist. No. 8 v. Stoeper, Civil No. 6100, D. Colo., July 3, 1961.

The *Traub* case (State *ex rel.* Traub v. Brown) is one of the earliest decisions dealing with the question of the provision of transportation to non-public school students. In that case, the Court held that a statute providing an appropriation for the direct transportation of children to parochial schools contravened the following provision of the Delaware Constitution:

> Art. X, § 3—No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school.

The Court indicated that the constitutional provision set out above not only proscribed appropriations in aid of sectarian schools but also prohibited the use of appropriations, once made, in aid of such schools. Although the Court recognized that the appropriation was not directly made to any sectarian school, the Court held that the expenditure appeared to be made to be used by or in aid of such schools and concluded,

> We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. *It helps build up, strengthen and make successful the schools as organizations. Id.* at 187, 172 Atl. at 837. (Emphasis added.)

In Smith v. Donahue, the court held that the use of public funds for the provision of textbooks and ordinary school supplies to non-public school pupils was violative of New York's constitution. The statutory provision in question provided that textbooks and ordinary school supplies be furnished to all pupils of each school district, and it was contended that the statute should be construed to mean that such books and supplies were to be furnished to the pupils and not to the particular school which they might attend. The court held that, even accepting that construction of the legislation, there plainly was a violation of con-

is also apparent in those decisions which have sustained the providing

stitutional provisions and premised its decision upon the following provision of the New York Constitution:

> Art. IX, § 4—Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

The court pointed out that in the case of the public schools there could be no question that textbooks and ordinary supplies were furnished directly to such schools as opposed to the contention that they were furnished to the students as distinct from the schools and therefore that there could be no such contention in the case of the non-public schools. The court, in adverting to the contended for construction that the materials were furnished to the pupils themselves and not to the schools which they attended, concluded:

> It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils, and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not an actual violation of the words, it is in violation of the true intent and meaning of the Constitution, and in consequence equally unconstitutional. *Id.* at 722, 202 App. Div. at 664.

That provision of the then New York Constitution set out above, was held determinative in *Judd v. Board of Educ.*, wherein the court invalidated legislation providing for equal use of transportation facilities by private and parochial school pupils under a transportation system authorizing the transport of public school pupils residing in any school district not maintaining a public school to a district in which such school was maintained. The court adverted to that provision of the then New York Constitution and, in particular, the words "directly or indirectly" in rejecting the contention that the provision of such transportation was not an aid to or in support of non-public schools; the court held that the intendment of those words was to proscribe any expenditure which might be of benefit to private or sectarian institutions or promotional of their interests and purposes. Citing the decision in *Traub*, the court concluded that, since free transportation of pupils induced attendance at the school, the provision of transport to non-public schools constituted an aid to or was in support of such schools within the meaning of the constitutional proscriptions.

In *Visser v. Nooksack Valley School Dist. No. 506*, the court construed the provisions of legislation providing that all children attending school in accordance with the compulsory attendance laws should be entitled to use the transportation facilities provided by the school district in which they resided. The basic question involved was whether that legislation compelled, or purported to compel, the board of education of a particular school district to furnish publicly-financed transportation to children attending parochial schools and the court considered the following provisions of the Washington Constitution applicable to the determination of that question:

> Art. I, § 11—No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment . . . .
>
> Art. IX, § 4—All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

The court held that school bus transportation to or from religious or sectarian schools constituted support or maintenance of such schools within the terms of

of such transportation or other "educational" aids on the ground that the recipient of the benefit thereby provided is the pupil and not the private or parochial school which the pupil may attend.[91] The de-

constitutional proscriptions against the same, the court concluding that transportation was a vital and continuous financial consideration in both the inception and operation of schools, and stating:

> Any private, religious, or sectarian schools which are founded upon, or fostered by, assurances that free public transportation facilities will be made available to the prospective pupils thereof, occupy the position of receiving, or expecting to receive a direct, substantial, and continuing public subsidy to the schools, *as such,* thus encouraging their construction and maintenance, and enhancing their attendance, at public expense. *Id.* at 708, 207 P.2d. at 203. (Court's emphasis.)

In *State ex rel. Reynolds v. Nusbaum,* the court held unconstitutional amendments to the school transportation statutes authorizing utilization of existing public school transportation facilities for the provision of conveyance of non-public school pupils to and from the nearest public school which they were entitled to attend. The court premised its decision upon, and held the amendments violative of, the following provision of the Wisconsin Constitution:

> Art. I, § 18—The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Noting that parochial schools constitute "religious seminaries" within the meaning of the clause set out above, the court held that the operation of the statutory amendments would result in the expenditure of public funds for their benefit since, prior to the amendments, certain parochial schools had been paying part or all of the cost of the transportation out of their school funds and therefore they would gain financially by the operation of the admendment, whereas others which did not provide such transportation would benefit through increased enrollment which the free transportation of pupils would induce. The existence of such financial gain and the benefit of increased enrollment inuring to the parochial schools by the operation of the amendments involved were held by the court to transgress the constitutional provisions set out above and, in particular, the last sentence thereof.

School Dist. No. 8 v. Stoeper suggests a tendency toward the invalidation of legislation providing for the transportation of parochial school students on a basis similar to those bases used by the decisions set out above; in that case, although the constitutional issue was neither properly before the court nor determinative of the question involved, the court indicated the following:

> . . . It might be pointed out, however, that public assistance to any religious or sectarian society or for any sectarian purpose or to help support or sustain any school operated by a sectarian group is prohibited in Article IX, Section 7 of the Constitution of Colorado. The weight of authority in other jurisdictions, where legislative attempts have been made to provide transportation to parochial school pupils in public school buses, in the face of similar constitutional provisions, is that such statutes trespass upon the constitutional prohibition.

91. Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed,* 365 U.S. 299 (1961); Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945); Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929), *aff'd*

termination of whether it is the pupil or the school which he attends

sub nom. Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Adams v. County Comm'rs, 180 Md. 550, 26 A.2d 377 (Ct. App. 1942); Board of Educ. v. Wheat, 174 Md. 314, 199 Atl. 628 (Ct. App. 1938); Everson v. Board of Educ., 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945), *aff'd*, 330 U.S. 1 (1947), *reversing*, 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944); see Squires v. Inhabitants of City of Augusta, 155 Me. 151, 153 A.2d 80 (1959).

The "child-benefit" theory, that "educational aids" may be afforded to non-public school students as a welfare measure inuring to the child, had its inception in *Borden v. Louisiana State Bd. of Educ.*, a case upholding the validity of legislation providing for the appropriation of monies from the general revenue to purchase school textbooks for distribution to all school children of the state of Louisiana. The constitutional attack made against this legislation was a broad one. The contention was that the statute violated constitutional proscriptions against the use of public funds for other than a public purpose, against the use of public monies, directly or indirectly, in aid of any church or denomination or for other private purposes, and prohibiting the use of public funds for the aid or support of any private or sectarian school. The court noted that prior to the enactment of this legislation parents of public school students, as well as parents of private and parochial school students, were required to purchase textbooks for the use of their children. In holding that none of the constitutional proscriptions alleged to have been violated were violated by the legislation in question, the court stated that the appropriation was made for the specific purpose of providing benefits for school children of the state, and that it was for their benefit and the benefit resulting to the state from the promotion of education that such appropriations were made. In this connection, the court concluded:

> True, these children attend school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. *The school children and the state alone are the beneficiaries. Id.* at 1019, 123 So. at 660. (Emphasis added.)

In Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So. 706 (1941), the court had before it the question of the validity of a statute providing for the establishment of a state textbook board to select, purchase and distribute free textbooks by loaning them to pupils in certain grades in all accredited elementary schools of the state. The court found that the operation of such legislation did not contravene the following constitutional provisions:

> MISS. CONST. art. VIII, § 208—No religious or other sect or sects shall ever *control* any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian schools, or to any school that at the time of receiving such appropriation is not conducted as a public school. (Emphasis added.)

The court, in viewing the legislation and applying it against the constitutional provisions, stressed that those constitutional provisions concerning the separation of church and state were directed at the proscription of *control* by one over the other and concluded that such bar to control could not preclude the state, in discharging its obligations as *parens patriae*, from affording welfare benefits to all the citizens of the state. Noting that attendance at a private or sectarian school complied with compulsory education legislation, the court stated that the intendment of the Legislature, in enacting the statute in question, was to carry out its constitutional mandate to encourage the promotion of education by furnishing "aids" to children in order to enable them to satisfy the duty of school attendance.

which is the beneficiary of legislation providing for transportation or

---

In adverting to the situation with regard to private and parochial school students, the court held that the legislation did not constitute a benefit to the private or parochial school attended by the student but only provided a benefit for the individual pupil; thus, the court concluded:

> Nor is the loaning of such books under such circumstances to the individual pupils a direct or indirect aid to the respective schools which they attend, although school attendance is compulsory. Such pupil is free to attend a proper public or private school, sectarian or otherwise. *Id.* at 475, 200 So. at 713.

Relying upon the assertion of promotion of the public welfare, the court in *Nichols v. Henry* upheld the validity of a statute providing for transportation of non-public school pupils directly to the non-public school which they attended. The act in question, appropriately entitled "an Act to promote the public welfare by providing supplemental transportation along highways, which have no sidewalks, for children attending school in compliance with the compulsory attendance laws" provided that the transportation therein contemplated be financed by separate appropriations from the general funds of each county and not out of any fund or taxes raised or levied for "educational purposes" or appropriated in aid of the public schools. The court held that the statute did not transgress any constitutional proscriptions against aid or support to a place of worship and further that it did not contravene constitutional limitations upon the use of public monies for other than a public purpose. The court, restricting the holding in Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (1942), to the proposition that the permanent school fund could not be utilized in providing transportation to parochial school pupils, held that the purpose to be accomplished by the legislation in question was a public one in that it constituted the extension of welfare benefits to all persons within the class intended to be protected and safeguarded by the provision of school transportation. In thus positing the existence of a public purpose, the court concluded that the benefit of the legislation inured to the school children and stated, that it

> . . . cannot be said . . . that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose. Neither can it be said that such legislation, or such taxation, is in aid of a church, or of a private, sectarian, or parochial school, nor that it is other than what it is designed and purports to be . . . legislation for the health and safety . . . The fact that in a strained and technical sense, the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law. *Id.* at 443-44, 191 S.W.2d at 934.

Although the prior decision in the *Sherrard* case could be restricted to the narrow ground that the use of the public school fund there involved for the provision of transportation constituted a transgression of constitutional inhibitions with regard to the use of the permanent school fund, the court in the *Nichols* case disregarded the fact that in the *Sherrard* case the court rejected the contention that the furnishing of transportation to parochial school students constituted a benefit to the child and not to the school. In that case, the court specifically stated that the theory that the benefit of transportation inures to the child and not to the school, and that therefore it can constitutionally be afforded to non-public school pupils, was "lacking in persuasive reasoning and logic." *Id.* at 478, 171 S.W.2d at 968.

In considering the validity of the provision of publicly-financed transportation to parochial school pupils, the appellate court in *Everson v. Board of Educ.* agreed with the lower court that the only constitutional provision involved was that assuring the inviolability of the permanent school fund but reversed the decision of the

other "educational" aids is immaterial since in either instance the

lower court (132 N.J.L. 98, 39 A.2d 75) on the ground that there was no proof that any part of the permanent school fund was used as a source for the provision of the transportation in question. The Court of Errors and Appeals adverted to the purpose of the inclusion of the inviolability provision and noted that by amendment to the constitution a mandate was imposed upon the Legislature to provide and promote free public education, and that in compliance with this mandate the Legislature had levied a state school tax to pay the cost of such education. The court then stressed that statutory provisions enacted pursuant to that mandate were subject to alteration, modification and revocation without limitation by those constitutional inhibitions applicable to the permanent school fund; and therefore the court concluded that all "school monies" were not within those constitutional proscriptions inhibiting the use of the permanent school fund to the public school system. In thus disregarding the fact that recourse to the general revenues was authorized only in order to carry out the constitutional mandate to maintain and support the *public* educational process, the court reached its conclusion that the Legislature could appropriate general revenues or authorize the use of local funds for the transportation of pupils to any school on the ground that such transportation resulted in the promotion and facilitation of education. The court stressed that the provision of transportation inured to the benefit of the school child and not the school which he attended; in thus holding that the public funds were expended for the benefit of individuals, the court also indicated that there was no transgression of constitutional provisions precluding the use of public funds for private purposes since the purpose of the legislation was to effectuate compliance with the compulsory education laws thus promoting the general interest in the furtherance of education and the general welfare resulting from the promotion of education. Thus, the court concluded that since education is a matter of public concern and since transportation is complementary to and in aid of the facilitation of education, the use of tax-raised monies in the promotion of education by providing transportation did not constitute the expenditure of public monies for other than a public purpose.

The statute involved in *Bowker v. Baker* provided that the board of any school district could allow transportation to pupils entitled to attend the district's school but in attendance at a school other than the public school, "under the same terms, in the same manner and over the same routes as children attending the public school." It was contended that when the school board in question voted to authorize the use of its transportation facilities for the conveyance of parochial school pupils in accordance with the statute, there was a violation of the following provisions of the state constitution:

> CAL. CONST. art. IV, § 30—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;
>
> Art. IX, § 8—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; . . .

The court, in upholding the constitutionality of the statute in question, stressed the fact that embodied in it was the exercise of the state's police power in promoting the public welfare by aiding the education of the young, and the court stressed that the direct benefit conferred by the statute inured to children with only an

purpose of the expenditure involved is to facilitate and effectuate the

incidental and, to this court, immaterial benefit resulting to the private schools; in recognizing the existence of such an "indirect benefit," the court held that such did not constitute an appropriation of public monies for private purposes and did not violate any constitutional proscriptions against state aid to denominational schools. Thus, the court set forth its adherence to the "child-benefit" theory, as follows:

> Raising the standard of intelligence of youth and providing for the safety of children are legitimate objects of government and are authorized under the police powers. It is also true that transportation of pupils to and from public schools is one of the legitimate methods adopted to help promote education and safeguard children. If the transportation of pupils to and from public schools is authorized . . . and if the benefit from that transportation is to the pupils, then an *incidental benefit flowing to a denominational school* from free transportation to its pupils should not be sufficient to deprive the Legislature of the power to authorize a school district to transport such pupils. *Id.* at 663, 167 P.2d at 261. (Emphasis added.)

The court noted that under another statute the transportation costs of veterans attending school under the State Veterans Educational Act had been upheld as not in violation of constitutional provisions [Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 Pac. 678 (1922)] and held that if the payment of such transportation costs did not violate constitutional proscriptions against the use of public funds for private purposes, then certainly permitting a ". . . little child to occupy a vacant seat in a school bus in order that he might attend a denominational school cannot be held to be such a violation." *Id.* at 665, 167 P.2d at 262.

The "child-benefit" theory was successfully invoked in *Snyder v. Town of Newtown*, a declaratory judgment action involving the constitutionality of a statute empowering a municipal corporation to provide transportation to pupils attending non-profit private schools as well as those attending public schools, such transportation to be paid out of the general fund of the particular municipal corporation or town. The general fund of the Town of Newtown included monies derived from property taxes, the permanent school fund, fees, licenses and permits and it was established that the transportation involved in this case had been provided to non-public school pupils from such fund; the court thus held that the statute was unconstitutional only insofar as it made available, for transportation of pupils attending other than public schools, funds derived from the permanent school fund, since to that extent the statute would contravene constitutional proscriptions against incursions upon the permanent school fund for other than public school purposes. The court, however, did hold that the legislation was not violative of constitutional provisions stating that no person should be compelled by law to join or support any congregation, church or religious association. The court indicated that transportation legislation is intended to facilitate the opportunity of children to obtain an education and that education, in itself, subserves a public purpose. In thus finding the existence of a public purpose in the promotion of education, notwithstanding the fact that when such transportation is afforded to parochial or private school students the education thus promoted is sectarian or non-public in nature, the court held that a statute which served a public purpose could not be invalidated because it incidentally benefited a limited number of persons and thus held that the Town of Newtown, by providing transportation for pupils of parochial schools, did not thereby compel the support of parochial schools and by doing so, the support of the particular church maintaining such schools. The court stated that the purpose and intendment of the legislation in question was to promote the general welfare in the cause of education and to afford protection and safety for children, thus aiding parents and their

educational process, which process encompasses both the child and the school; thus, the providing of transportation brings together those elements whose coalescence is necessary to the operation of the educational process, and the furnishing of "educational" materials facilitates and assists the operation of the educational process. The providing of publicly-financed aids and benefits to the public educational process is constitutionally defensible as an exercise of a governmental function furthering the maintenance and development of the public school system;[92] the use of public monies to aid or benefit private or parochial educational processes is without the scope of that governmental function and there exists no other constitutional basis upon which such use of public monies can be grounded. Certain decisions in this area have recognized that any attempt to bifurcate the benefit conferred by the providing of transportation and other "educational" aids results in the establishment of a false dichotomy and have recognized that the constitutional prohibition against aid or support to private or parochial schools and institutions of learning is one that operates against aid to such schools and institutions in their educational capacity and that any public assistance to the educational process of such schools and institutions falls within the constitutional

---

children and not the particular school or schools which such children attended; thus, the court concluded:

> It [the statute] primarily serves the public health, safety and welfare *and fosters religion.* In the light of our history and policy, it cannot be said to compel support of any church. It therefore does not come within the proscription of article seventh. It comes up to, but does not breach, the 'wall of separation' between church and state. *Id.* at 391, 161 A.2d 778. (Emphasis added.)

Although no constitutional question was involved in *Squires v. Inhabitants of City of Augusta,* the court there indicated its adherence to the viability of the "child-benefit" theory. The court, in invalidating an ordinance for the provision of transportation of pupils to and from non-public schools, did so on the basis that the municipal corporation involved was one of limited powers, and the validity of its ordinances was dependent upon the existence of proper enabling legislation. In referring to the extent of the state's involvement with the educational system, the court noted that many statutes providing for the utilization of public monies by municipal corporations for the financing of educational activities had been enacted and sustained by the state and its courts and held that transportation of pupils to public schools constituted a proper educational activity. In this regard, the court concluded:

> We are satisfied that a properly worded enabling act, authorizing muncipalities to expend funds for the transportation of children to private schools not operated for profit, if one were in fact to be enacted by the Legislature, would meet constitutional requirements. In so saying, we recognize that the decision of the Supreme Court of the United States in *Everson* is the law of the land and that the provisions of the Maine Constitution relating to the expenditure of public monies for public purposes and to the separation of the church and state, carry no more stringent prohibitions than the First and Fourteenth Amendments to the Federal Constitution. *Id.* at 164, 153 A.2d at 87.

92. See notes 29-34 *supra* and text supported thereby.

ban.[93] These decisions demonstrate that the issue is not whether the

93. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed*, 368 U.S. 517 (1962); Board of Educ. for Ind. School Dist. No. 52 v. Antone, 384 P.2d 911 (Okla. 1963); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed*, 317 U.S. 588 (1942); Dickman v. School Dist. No. 62C, 366 P.2d 533 (Ore. 1961), *cert. denied*, 371 U.S. 823 (1962); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943); see Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (1942) (dictum); State *ex rel.* Van Stratten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923) (by implication).

The court in *Gurney v. Ferguson* dealt with legislation providing that when a school district authorized transportation for its public school pupils, children attending private or parochial schools along or near the route of the public school bus were equally entitled to the benefits of such transportation; under the operation of this statute, those children attending private and parochial schools would not be transported to those schools but only to points on the route of the public school bus. The court, in holding this "shared-ride" transportation statute invalid, found that it contravened the following provision of the Oklahoma Constitution:

> Art. II, § 5—No public money or property shall ever be appropriated, applied, donated, or used, *directly or indirectly*, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution *as such*. (Emphasis added.)

In overruling the contention that parochial schools were not sectarian institutions within this constitutional prohibition, the court referred to the provision in the Oklahoma Constitution that the state is to maintain and establish a public educational system free from sectarian control and held that that provision, read in connection with the constitutional provision set out above, made it clear that the use of public money or property for sectarian or parochial schools or school systems was prohibited. The court noted that the expenditure of public funds under this statute was confined to children attending school and indicated that this refuted any contention that the transportation was for the benefit of children generally and not for schools or that such transportation was furnished in regulating traffic within the police power or primarily in promoting the health and safety of the children of the state. In rejecting the contention that the provision of transportation was not a benefit or aid to the school, the court proceeded to analyze the basis upon which such transportation to public school pupils was afforded and noted that the expenditure of public funds in the provision of such transportation had been upheld as a proper expenditure in furtherance of the state's constitutional duty and public function in maintaining schools as organizations and institutions. The court stressed that if the cost of school buses and the maintenance and operation thereof were not in aid of the public educational process, then expenses therefor out of the permanent school funds or other funds appropriated for "educational purposes" would be unauthorized and illegal and that since it was established that the expenditure of public funds for such transportation was constitutionally defensible because in furtherance of the public educational process, it followed that when pupils of a private or parochial school were transported, that service was likewise in aid of and promotional of the educational process carried on by the school attended by such pupils. The court pointed out that the state had no authority to maintain or aid any educational process other than the public school system and that it was proscribed from affording aid or support to sectarian schools and private educational institutions, as such, that is,

institution or the child is aided but whether the educational function

in their capacity as the exponent of an educational process. The court concluded that the intent and purpose, as well as the clear language of the constitutional expression, demonstrated that such aid or support could not be extended when it merely aided the educational process carried on by the particular school and did not directly aid the school itself by use of vague theories turning upon a determination of to whom the primary impact of the benefit of such legislation was directed.

In the case of *Board of Educ. for Ind. School Dist. No. 52 v. Antone,* the court dealt with the contention that the decision in *Gurney v. Ferguson* was no longer controlling with regard to the validity of providing publicly financed transportation to parochial school students since that decision was handed down prior to the decision of the U.S. Supreme Court in the *Everson* case. The court rejected the contention that *Everson* stood for the proposition that by framing legislation as directed toward providing for needy children, providing for the education of all children within the state, and affording facilities for the same, this determined that the legislation was valid as directed at the general welfare of the community, the court stating that the issue is the purpose of the use of public money or public property and holding that where public school buses are used to afford transportation to parochial school pupils, an unlawful and unconstitutional use of public funds results.

Mitchell v. Consolidated School Dist. No. 201 struck down a statute providing for the transportation of school children attending private or parochial schools in all cases wherein provision for the transportation of public school pupils was made, the court finding that the use of *any* public fund for such transportation violated constitutional proscriptions against the appropriation or the use of money or property to any religious worship, exercise or instruction, or to the support of any religious establishment. The court stated that it was clear that such constitutional proscriptions were violated unless it could logically be maintained that the transportation of pupils to and from the parochial school was of no benefit to the school itself or to the educational process carried on by the school but that it was rather, as contended, a benefit inuring exclusively to school children. In rejecting that contention, the court stated:

> We cannot . . . accept the argument that transportation . . . is not beneficial to, and in aid of, the school. Even legislation providing for transportation of pupils to and from public schools is *constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system. Id.* at 64, 135 P.2d at 81. (Emphasis added.)

The court concluded that it could not be controverted that transportation, in itself, constituted a component part of the public educational process and that only on such basis could transportation be afforded to school children. The court indicated that if the validity of the argument that such transportation inured exclusively to the benefit of pupils because relieving them of an obligation incident to the compulsory attendance laws were conceded, the statute would then violate constitutional proscriptions against the use of public funds for the benefit of individuals, that is, those individuals attending private or parochial schools.

In rejecting the applicability of the "child-benefit" theory, the court in *Matthews v. Quinton* held that the provision of transportation to school children was constitutionally defensible only as the provision of an essential to the public educational process, the cost of which was as much a part of the total expense of that process as any other item. In this case, the court considered the constitutionality of a transportation statute which had been passed by the territorial legislature

or process of the institution is benefited and supported; in these de-

prior to the adoption of the Alaska Constitution. The statute in question provided transportation to parochial school children to that school attended by them and the court held that both under the Organic Act of Alaska, ch. 387, 37 Stat. 512 (1912) (codified in scattered sections of 48 U.S.C.) and under the Alaska Constitution, such a statute would be invalid. The main emphasis of the court's decision, in holding the legislation violative of the Organic Act and, in indicating that if the legislation were re-enacted, it would contravene the Alaska Constitution, was that the provision of such transportation to non-public school pupils would be an expenditure of public funds for other than a "public purpose" and would result in a "direct benefit" to educational institutions and educational processes other than the public school system, which was the only educational process that the state could constitutionally support and maintain. The court rejected the contention that the intendment of the legislation, as stated therein by the Legislature, was to promote public health and welfare and indicated that it was only because transportation constituted a component part of the public educational process that the same could be afforded to public school students; thus, the provision of transportation to non-public school students would result in the effectuation and facilitation of private and sectarian educational processes and would also constitute the diversion of tax-raised moneys to the benefit of private individuals or for private purposes, if the theory that only the parochial or private school child would be benefited by such legislation were accepted.

The validity of the expenditure of public funds by a school district for the provision of textbooks free of charge to pupils of private and parochial schools under a state program for such distribution was considered in *Dickman v. School Dist. No. 62C.* In this decision, the court held that the statute was violative of ORE. CONST. art. I, § 5 providing that "no money shall be drawn from the treasury for the benefit of any religious, or theological institution." The court held that the expenditures involved, made from the school district's general fund, were proscribed by the foregoing constitutional provision and violative of the design of that provision to keep separate the functions of state and church and to prevent the influence of one upon the other in the area of education. The court noted, and rejected, the "child-benefit" contention, stating that such theory could not be used to justify the expenditure of public funds in order to meet the educational needs of pupils attending private and parochial schools. The court thus held that those expenditures which aid the child as the pupil of a private or parochial school could not be regarded as serving the public welfare in the promotion of education, since the state was proscribed from promoting or aiding any educational process other than the public educational process embodied in the public school system. Thus, the Court indicated that the proscription contained in the constitutional provision was not only against aid to the school or institution but to its functions as an educational organization, which functions, in the case of parochial schools, are the promotion of religious education. The court stated that in determining the validity of an expenditure, the determinative factor was not whether a private or sectarian institution might derive some benefit or aid therefrom, and that the function of the institution which was aided by such expenditure was the dispositive factor:

> . . . . [W]here the aid is to the pupils and schools the benefit is identified with *the function of education* and if the educational institution is religious, the benefit accrues to the religious institutions *in their function as religious institutions.* And so it is in the case at bar. *Granting that pupils and not schools are intended to be the beneficiaries of the state's bounty, the aid is extended to the pupil only as a member of the school which he attends.*

cisions, the dispositive factor is the existence of an aid or benefit to the private or sectarian educational process conducted by the institution involved.[94]

Those decisions which have upheld the providing of publicly-financed transportation and other "educational" aids to non-public school students have done so on the theory that it is within the state's competence in the exercise of its police power to provide for the care, safety and protection of school children and to promote education by providing certain tools essential to the functioning of the educational process; in making this assumption, these courts have disregarded the fact that the state does not ordinarily stand as *parens patriae* with regard to children[95] and that the providing of transportation to public school children has only withstood the constitutional objection of diversion of public funds to private purposes because such provision constitutes a component part of that governmental function embodied in the public school system.[96] These decisions, in regarding the child as the beneficiary of the protection afforded by transportation and the recipient of the ability to gain knowledge afforded by the providing of other "educational" aids, have not taken cognizance of the fact that such transportation and such "educational" aids are only provided in connection with the operation of an educational process; by thus regarding the child as separate from the educational process in which he is engaged, these courts have premised that general welfare deriving from the protection of children and the advancement of their knowledge are evidence of the existence of a public purpose or public function. Once it has been assumed that a public purpose or public function exists, it follows that the state, because of the strict neutrality which it must maintain, cannot deny the benefits resultant from

---

Whoever else may share in its benefits, such aid is an asset to the schools themselves. *Id.* at 543. (Emphasis added.)

The court noted that although it was difficult, in some instances, to determine whether the particular expenditure aided religious institutions in their "religious capacity" or in their capacity as members of the community or members of the public, a clear line was shown when that which was furnished constituted an integral part of the institution's *educational process.*

94. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed,* 368 U.S. 517 (1962); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed,* 317 U.S. 588 (1942); Dickman v. School Dist. No. 62C, 366 P.2d 533 (Ore. 1961), *cert. denied,* 371 U.S. 823 (1962); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943). See also, *Lien v. City of Ketchikan,* in which the court stated: "The test of whether a public purpose is being served does not depend on the religious or non-religious nature of the agency that will operate the leased property, but upon *the character of the use to which the property will be put.*" *Id.* at 722. (Emphasis added.)

95. See notes 76-79 *supra* and text supported thereby.

96. See notes 25-34 *supra* and text supported thereby; and see cases cited notes 36-37 *supra.*

the exercise of that function to any members of the public within its scope and, therefore, these courts have found no contravention of constitutional proscriptions against aid to sectarian education; through this process of reasoning, those constitutional strictures upon the state's ability to promote the general welfare, through aid of or support to sectarian institutions or sectarian interests and those interdicting the use of public monies for a private benefit have been negated. This elision of the educational process resultant from consideration of the issues of public purpose and aid or support to private or sectarian interests and institutions as separate and distinct questions is reflected in *Everson v. Board of Education*,[97] the first case[98] in which the United States Supreme Court considered the isolated issue of the scope of the Establishment Clause of the First Amendment as made applicable to the states through the Fourteenth Amendment. In the five to four decision upholding the constitutionality of New Jersey's expenditure of public funds for the transportation of public

97. 330 U.S. 1 (1946).

98. In Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929) the argument was also made that the statute providing for the distribution of free textbooks to all school pupils violated the due process clause of the federal constitution in providing for the levy and expenditure of public funds for other than a public purpose; the court answered that argument by stating that the taxes appropriated under the statute in question constituted a legal expenditure for a public purpose, that is, the promotion of education. The Louisiana Supreme Court reaffirmed its holding in the *Borden* case in a companion case, which was appealed to the United States Supreme Court and affirmed in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). The decision of the Supreme Court of the United States in the latter case was restricted to a consideration of the federal question presented, that is, whether public funds were being used for a private purpose in contravention of the due process clause of the fourteenth amendment of the federal constitution. The court, in upholding the determination of the Supreme Court of Louisiana, utilized that premise basic to decisions of the United States Supreme Court in this area, that is, that the state's construction of state law and determination of the existence of a public purpose, is ordinarily to be accepted (See, notes 99-101, *infra*). It should be pointed out that the decision in *Cochran* involved no issue with regard to the question of constitutional proscriptions requiring the separation of church and state since those first amendment provisions were not held applicable to the states through the fourteenth amendment until the later decision of the Supreme Court of the United States in Cantwell v. Connecticut, 310 U.S. 296 (1940).

See School Dist. of Abington Township v. Schempp (Murray v. Curlett), 83 Sup. Ct. 1560 (1963) (Brennan, J., concurring),

> . . . It is only recently that our decisions have dealt with the question whether issues arising under the Establishment Clause may be isolated from problems implicating the Free Exercise Clause. *Everson v. Board of Education* . . . is in my view the first of our decisions which treats a problem of asserted unconstitutional involvement as raising questions purely under the Establishment Clause. A scrutiny of several earlier decisions said by some to have etched the contours of the clause shows that such cases neither raised nor decided any constitutional issues under the First Amendment. . . . *Id.* at 1584.

and parochial school pupils, the majority opinion stressed the fact that the state had obviously found that a public purpose would be subserved by such an application of tax-raised funds and, noting that the far reaching authority of the United States Supreme Court to invalidate state legislation on the ground that no public purpose exists must be exercised with "extreme caution"[99] and has been exercised only "in rare instances,"[100] the majority opinion apparently accepted the state's declaration of the existence of a public purpose.[101] In thus assuming

99. See, *e.g.*, Green v. Frazier, 253 U.S. 233 (1920) dealing with the general area of interference by the federal government in the operations of the state and the fact that, since a primary purpose of the existence of states is to afford to their citizens those general welfare benefits decreed by state legislatures, the United States Supreme Court must be careful in dealing with questions involving the existence of a public purpose not to usurp or prevent the exercise of that general welfare power. In this case, which is quoted in the majority opinion in the *Everson* case (330 U.S. 1, 6) the Court held that every presumption in favor of the existence of a public purpose, when the same has been found by the state, is to be indulged and that only where clear and demonstrated transgression of power exists will judicial interference be authorized; thus, the Court there stated that policy which has been adhered to by the United States Supreme Court in dealing with questions in the area of "public purpose":

> In the present instance, under the authority of the Constitution and laws prevailing in North Dakota, the people, the legislature, and the highest court of the state have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the state. *With this united action of people, legislature, and court, we are not at liberty to interfere unless it is clear, beyond reasonable controversy, that rights secured by the Federal Constitution have been violated.* What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. . . .
> Questions of policy are not submitted to a judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. . . . *Id.* at 239-40. (Emphasis added.)

100. See, *e.g.*, Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55 (1937); City of Parkersburg v. Brown, 106 U.S. 487 (1883); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875), cited by the majority in the *Everson* case (330 U.S. 1, 6) as examples of those infrequent instances in which the United States Supreme Court has held that state legislation was invalid because the expenditures involved were not to be made for a "public purpose."

101. The majority opinion, in discussing the contention that no "public purpose" existed, assumed the existence of a public program by concluding, in effect, that the provision of transportation to school children, in itself, and apart from the fact that it is part and parcel of the public educational system and process, is a public program, that is, one designed to afford protection to children from the hazards incident to walking, hitchhiking, etc. notwithstanding the fact that such hazards might be incurred at other times than those instances when children, who are the objects of this supposed general welfare program, are on their way to and from school. Thus, the majority, after accepting the existence of a public program, then went on to say that the fact that the benefits of such program may inure to certain individuals did not demonstrate that the "public program,"

the existence of a public program, the majority stated that which naturally follows from the existence of such a program; that is, that the state in its position of strict neutrality must afford the benefits thereof to all persons within the scope of the program in the following language:

> . . . [W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its *general state law benefits* to all its citizens without regard to their religious belief.[102] (Emphasis added.)

The dissent of Justice Rutledge,[103] in which Justices Frankfurter, Jackson and Burton joined, and the separate dissent of Justice Jackson[104] took issue with the majority opinion only with regard to the assumption of the existence of a public purpose, the essence of the difference being that the state cannot, by declaring that a public purpose exists, make a public function of the providing of aid and support to a private or sectarian educational process. Thus, the only issue over which the majority and dissenting opinions disagreed was that the providing of transportation can be separated from the educa-

---

whose existence the majority assumed, had a private rather than a public purpose. For example,

> It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. . . . The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public buses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking." . . . *Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program.* Everson v. Board of Educ., 330 U.S. 1, 7 (1946). (Emphasis added.)

The same proclivity toward acceptance of the state's declaration of the existence of a "public purpose," and the results which follow from the existence of such a public purpose, that is, that individuals cannot be denied the benefit of a public program because of any considerations concerning religion, is seen in the Court's decision affirming the provision of free textbooks in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). Although, as indicated (see note 98 *supra*) there was no question of the exercise of religious liberty or establishment of religion involved in the *Cochran* decision, that case demonstrates the proclivity of the Supreme Court of the United States toward relying heavily upon the recitation by the highest court of a state with regard to the purpose and effect of state legislation which has been considered by it:

> *Viewing the statute as having the effect thus attributed to it* (by the Louisiana Supreme Court), *we cannot doubt that the taxing power of the state is exerted for a public purpose.* The legislature does not segregate private schools or their pupils as beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its methods, comprehensive. Individual interests are aided only as the common interest is safeguarded. *Id.* at 375. (Emphasis added.)

102. Everson v. Board of Educ., 330 U.S. 1, 16 (1946).

103. *Id.* at 28-72.

104. *Id.* at 18-28.

tional process which it facilitates.[105] That the majority opinion does not support the proposition that the state, to any extent or in any amount, can constitutionally aid or support sectarian interests or religious exercises is strongly reflected in subsequent decisions of the United States Supreme Court dealing with the scope of the Establish-

105. Compare the statement of the majority opinion in the *Everson* case with regard to the scope of the establishment clause with those statements concerning that scope made by the dissenting Justices; thus, the majority concluded (330 U.S. 1, 16) that under the clause "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Justice Jackson stated, in his separate dissent (330 U.S. 1, 26), with regard to the scope of the establishment clause, ". . . that the effect of the religious freedom amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense." And the dissent of Justice Rutledge, stated with regard to the scope of the clause (330 U.S. 1, 33) that "the prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes."

The essence of Mr. Justice Jackson's disagreement with the majority's separation of the provision of transportation from the educational process, is reflected in the following statement contained in his separate dissent:

> . . . The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them. But they cannot, through school policy any more than through other means, invade rights secured to citizens by the Constitution of the United States. . . . One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *Id.* at 21-22.

The essence of the separate dissent of Mr. Justice Rutledge is that the majority had disregarded the fact that transportation, where it is needed, is an essential of the educational process and that the majority, by separating the provision of transportation from that process which it facilitates, had assumed the existence of a public function or public purpose and therefore, by so assuming, had decided the issue under the establishment clause; thus, Mr. Justice Rutledge stated:

> *We have here then one substantial issue, not two.* To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion and religious teaching. *Conversely, to say that they are for public purposes is to say that they are not for religious ones.*
>
> This is precisely for the reason that education which includes religious training and teaching, and its support, have been made matters of private right and function, not public, by the very terms of the First Amendment. That is the fact not only in its guaranty of religion's free exercise, but also in the prohibition of establishments. *Id.* at 51. (Emphasis added.)

See LA NOUE, DECISION FOR THE SIXTIES: PUBLIC FUNDS FOR PAROCHIAL SCHOOLS?, 21 n.69 (Department of Religious Liberty, National Council of Churches 1963).

ment Clause and the interrelationship of that clause with the Free Exercise Clause of the First Amendment.[106]

Although it has been indicated that the decision in *Everson v. Board of Education* implied that some form of assistance is consonant with and not violative of the Establishment Clause[107] (and the case has been so cited by state courts in their consideration of challenged transportation statutes)[108] and, notwithstanding the fact that there is some question with regard to the continued viability of the decision,[109] it is clear that the decision did not foreclose state courts from determining whether under state constitutions that "form of assistance" embodied in the providing of publicly-financed transportation to

106. See, *e.g.*, School Dist. of Abington Township v. Schempp (Murray v. Curlett), 83 Sup. Ct. 1560 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961).

107. See, *e.g.*, the following statement of Mr. Justice Brennan with reference to the *Everson* decision, School Dist. of Abington Township v. Schempp, 83 Sup. Ct. 1560 (1963):

> . . . Yet even *this form of assistance* was thought by four Justices of the *Everson* court to be barred by the Establishment Clause because too perilously close to that public support of religion forbidden by the First Amendment. *Id.* at 1592. (Emphasis added.)

Compare Swart v. South Burlington Town School Dist., 122 Vt. 177, 167 A.2d 514 (1961), *cert. denied*, 366 U.S. 925 (1961), in which the court held invalid a provision for the payment of tuition for students attending parochial schools on the same terms and conditions as such payments were made for students attending public schools in adjoining towns. The court's decision turned upon the establishment clause of the first amendment in that the state constitution contained no prohibition against aid or support to sectarian education and the court, in thus construing the establishment clause, held that it was without the scope of the state to make a public purpose or public function out of the promotion and furtherance of sectarian education. Although it was contended that the tuition payment arrangement constituted a public purpose and program furthering the promotion of education in the provision of tuition payments for those students who were compelled to attend high schools in towns other than their own because none were maintained in their town, the court rejected this contention, stating:

> Equitable considerations however compelling, cannot override existing constitutional barriers. Legislatures and courts alike cannot deviate from the fundamental law. *Id.* at 188, 167 A.2d at 520-21.

108. Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1961); Squires v. Inhabitants of City of Augusta, 155 Me. 151, 153 A.2d 80 (1959).

109. See Engel v. Vitale, 370 U.S. 421 (1962) in which Mr. Justice Douglas, a member of the five to four majority in the *Everson* case, stated with respect to that decision:

> My problem today would be uncomplicated but for Everson v. Board of Education . . . , which allowed taxpayers' money to be used to pay 'the bus fares of parochial school pupils as a part of the general program under which' the fares of pupils attending public and other schools were also paid. The Everson Case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples. . . . *Id.* at 443.

private and parochial school students is proscribed. The decision in the *Everson* case is not premised on an equal protection theory, the majority opinion not only not intimating that parochial and private school pupils have a right to transportation when such facility is afforded to children attending public schools, but expressly negating the existence of any such right;[110] the decision leaves to the states the question of whether under their constitutions that degree of "support" involved in the providing of transportation violates constitutional principles based on the same precepts as those upon which the Establishment Clause is premised, and the state courts have found themselves neither obliged to arrive at the same conclusion nor to accept the rationale of the *Everson* decision.[111]

110. 330 U.S. 1, 16.

111. See Matthews v. Quinton, 362 P.2d 932, 936-37 (Alaska 1961) (in *Everson* the New Jersey court concluded that the state constitution did not prohibit the use of public funds and the United States Supreme Court ". . . by an unpersuasive 5 to 4 decision" upheld the finding of the New Jersey court), *appeal dismissed*, 368 U.S. 517 (1962); Board of Educ. for Ind. School Dist. No. 52 v. Antone, 384 P.2d 911, 913 (Okla. 1963) ("On appeal of the Federal question only, the United States Supreme Court held that the state statute was not violative of the first amendment of the Federal Constitution; that the state statute would not be stricken down if it in any way is within the Constitutional power of the state. Notwithstanding the practical effect of the holding, it essentially constitutes a ruling that transportation of parochial pupils is not a Federal question, at least when tested by the First Amendment. As we view it, the decision does not change the effect of state constitutional provisions."); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 711, 207 P.2d 198, 204-05 (1949) ["although the decisions of the United States Supreme Court are entitled to the highest consideration as they bear on related questions before this court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the *Everson* majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such schools. While the degree of support necessary to constitute an establishment of religion under the first amendment to the Federal constitution is foreclosed from consideration by reason of the decision in the *Everson* case . . . we are constrained to hold that the Washington constitution, although based upon the same precepts, is a clear denial of the rights herein asserted by appellants." (Court's emphasis.)]; State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 165, 115 N.W.2d 761, 770 (1962) ("Thus, we deem that the First amendment provision, which prohibits laws 'respecting an establishment of religion,' lends itself to more flexibility of interpretation than the provision contained in the last clause of sec. 18, art. I, of the Wisconsin constitution. . . . Furthermore . . . the weight of authority since the *Everson* case is clearly against the constitutionality of providing publicly financed transportation and related aids to nonpublic school children."); Dickman v. School Dist. No. 62C, 366 P.2d 533, 545 (Ore. 1961) ("As we have indicated, *Everson* . . . is distinguishable from the case at bar. Even if it were not, our conclusion would be the same."), *cert. denied*, 371 U.S. 823 (1962).

V. CONCLUSION

The majority of decisions which have considered the constitutionality of the providing of publicly-financed transportation and other "educational" aids to non-public school pupils under constitutional provisions similar to those in Missouri, regardless of whether the issue has arisen prior to or after the decision of the United States Supreme Court in the *Everson* case, have invalidated the use of state power and the expenditure of public monies involved in the providing of such facilities;[112] some of these decisions have based their conclusions on the ground that the expenditure involved constitutes aid or support, direct or indirect, to the private or parochial school,[113] while others have reached the more realistic result that the providing of such facilities constitutes a proscribed aid to the private or parochial educational process.[114] These decisions recognize that the providing of transportation is a component part of the educational process and, in invalidating the furnishing of publicly-financed transportation to private and parochial school students, have held, either explicitly or implicitly, that application of the principle of the separation of church and state in the area of education requires the proscription of any aid or support to sectarian schools or institutions of learning in their capacity of carrying on the function of an educational process religious in nature.

Those decisions which have sustained the constitutionality of statutes affording publicly-financed transportation and other "educational" aids to private and parochial school students have done so

112. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961); State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934), *appeal dismissed on other grounds*, 39 Del. 187, 197 Atl. 478 (1938); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Smith v. Donahue, 195 N.Y. Supp. 715, 202 App. Div. 656 (1922); Board of Educ. for Ind. School Dist. No. 52 v. Antone, 384 P.2d 911 (Okla. 1963); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed*, 317 U.S. 588 (1942); Dickman v. School Dist. No. 62C, 366 P.2d 533 (Ore. 1961), *cert. denied*, 371 U.S. 823 (1962); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962); see School Dist. No. 8 v. Stoeper, Civil. No. 6100, D. Colo. July 3, 1961.

113. State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (Super. Ct. 1934), *appeal dismissed on other grounds*, 39 Del. 187, 197 Atl. 478 (1938); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Smith v. Donahue, 195 N.Y. Supp. 715, 202 App. Div. 656 (1922); Visser v. Nooksack Valley School Dist. No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

114. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *appeal dismissed*, 368 U.S. 517 (1962); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed*, 317 U.S. 588 (1942); Dickman v. School Dist. No. 62C, 366 P.2d 533 (Ore. 1961), *cert. denied*, 371 U.S. 823 (1962); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943).

upon the ground that such legislation constitutes the exercise of the state's general welfare power.[115] In thus upholding the validity of the provision of such facilities, these cases have recognized that transportation, in fact, is an aid to the educational process, but in attempting to distinguish between the beneficiaries of this aid and to determine that recipient to whom the primary benefit of the aid results, these courts have apparently lost sight of that principle. These courts have also failed to take cognizance of the fact that it is because the state cannot interfere with the rights of parents to choose that form of instruction and education for their children which they wish, that parents may comply with compulsory education laws by use of privately owned and operated institutions of learning meeting the standards for educational accreditment imposed by the state. On this same ground, the state cannot, without transgression of constitutional proscriptions against the use of public monies for private purposes, furnish assistance to the exercise of these private rights, that is, participation in the private educational process carried on by the private schools or participation in the religious educational process maintained by the parochial schools.

In certain of the decisions wherein the providing of transportation and other "educational" aids has been sustained, the constitutional provisions involved have been distinguishable from those in Missouri and the decisions have turned in part upon such distinctions.[116] More-

115. Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960) (dictum), *appeal dismissed* 365 U.S. 299 (1961); Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945); Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929), *aff'd sub nom.* Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Adams v. County Comm'rs, 180 Md. 550, 26 A.2d 377 (Ct. App. 1942); Board of Educ. v. Wheat, 174 Md. 314, 199 Atl. 628 (Ct. App. 1938); Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So. 706 (1941); Everson v. Board of Educ., 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944), *rev'd*, 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945), *aff'd*, 330 U.S. 1 (1946); See Squires v. Inhabitants of City of Augusta, 155 Me. 151, 153 A.2d 80 (1959).

116. Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946) (in this case the court stressed the fact that its constitutional provisions did not proscribe "indirect aid" to denominational schools whereas such a provision was contained in the constitutions of states in which the provision of transportation had been invalidated); *Snyder, v. Town of Newtown*, 147 Conn. 374, 386-87, 161 A.2d 770, 777 (". . . the word 'support' in article seventh was never intended to be employed in so narrow a sense as to prevent every sort of incidental public assistance to, and encouragement of, religious activity."); Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So.2d 706 (1941) (the court's decision of legality with regard to the provision of publicly-financed textbooks turned on that constitutional provision proscribing "control" of any part of school or other "educational funds" by sectarian interests and the court premised its conclusion of constitutionality on the determination that the mere availing of the benefits of an appropriation

over in certain of these decisions the courts have stressed the fact that no additional expense would accrue by virtue of furnishing the use of public school transportation facilities to private and parochial school students; these decisions, utilizing the principle of *de minimis,* have held that, since public school transportation constitutes a valid expenditure of public monies, the fact that an "incidental" benefit of such expenditure inures to sectarian interests and institutions is not invalidating.[117] Other decisions in this area which have invalidated the providing of publicly-financed transportation have recognized the fact that only a small or negligible expense is imposed upon the public by virtue of the providing of public school facilities in affording transportation to private and parochial school students but have rejected the applicability of the *de minimis* doctrine to the area of the separation of church and state in the field of education;[118] decisions in Missouri, dealing with issues other than the providing of transportation, have similarly indicated their rejection of the utilization of *de minimis* with regard to proscriptions against aid or support to sectarian education.[119] In this connection it should be noted that the recent decision of the Supreme Court of the United States in *Engel v.*

---

did not result in *control* of such funds, since the use thereof was controlled only by the purposes for which the legislature had designated it).

117. Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946) (holding that where the main purpose of an enactment is lawful and an incidental or immaterial benefit results to some person or organization, *which benefit is not directly permitted by law,* this incidental benefit alone will not defeat the legislation and also differentiating other decisions invalidating the provision of transportation to non-public school pupils on the ground that in those decisions it was shown that under the statute there involved there would have been required direct expenditure of considerable sums to purchase additional buses whereas under the statute being considered by this court only existing public school transportation facilities would be used); Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945) (*semble*); Everson v. Board of Educ., 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944), *rev'd,* 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945), *aff'd,* 330 U.S. 1 (1946) (since the transportation invclved was to be accomplished by the use of public school buses over established public school routes, the payment of any additional expense out of local taxes would only be the payment of an "incidental" expense and this was not invalidating because local school districts were authorized to raise funds by special district taxes to defray current charges and expenses of the public schools including transportation and "incidental" expenses).

118. Board of Educ. for Ind. School Dist. No. 52 v. Antone, 384 P.2d 911 (Okla. 1963); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), *appeal dismissed,* 317 U.S. 588 (1942); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943); State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

119. See Berghorn v. Reorganized School Dist. No. 8, 364 Mo. 121, 260 S.W.2d 573 (1953); Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1941).

Vitale[120] significantly demonstrates that in cases involving separation of church and state questions, the doctrine of *de minimis* has no applicability whatever. In that case both the majority and concurring opinions adverted to the fact that the amount of teacher time, and consequently public expenditure, involved in recitation of the Regents' Prayer was extremely small but pointed out that in the application of the Establishment and Free Exercise clauses, it is not the extent but the fact of governmental interference that is constitutionally invalidating.

The Constitution of Missouri has imposed upon the Legislature a mandate to provide for the free public education of the youth of this state in order to assure the "general diffusion of knowledge and intelligence . . . essential to the preservation of the rights and liberties of the people."[121] The expenditure of public funds in aid or support of the operation of this public educational process thus enjoined upon the Legislature is constitutionally defensible against attack because it serves that public purpose embodied in the public school system; it is submitted that it is upon this basis, and this basis only, that the providing of publicly-financed transportation to school students can be upheld. The Legislature has provided a public educational system, a component part of which is the providing of transportation in certain instances; this public educational process, with all its facilities and component parts, is a public purpose and public function which the state has fully and completely assumed and performed for the welfare and benefit of the entire class of its citizens within the object and scope of that purpose and function. When a child is withdrawn from the scope of that object and purpose by placement in a private or parochial school, he becomes a part of the private or parochial educational process there involved; no public benefit or public purpose can be obtained in providing that which the state has completely provided at public expense, and therefore, it is submitted, that any expenditure to aid or assist such private or sectarian educational processes is not constitutionally supportable.

120. 370 U.S. 421 (1962).

121. Mo. CONST. art. IX, § 1(a).

CONTRIBUTORS TO THIS ISSUE

HERBERT HAN-PAO MA—LL.B. 1950, National Taiwan University. Teaching Assistant 1950-55, Instructor 1955-60, Associate Professor of Law 1960-present, National Taiwan University. Author of numerous articles on Jurisprudence and Constitutional Law.

JOHN REID—B.S.S. 1952, Georgetown University; LL.B. 1955, Harvard University; M.A. 1957, University of New Hampshire; LL.M. 1960, J.S.D. 1962, New York University. Assistant Professor of Law, New York University. Member, New Hampshire Bar.

GERALD TOCKMAN—A.B. 1958, LL.B. 1960, Washington University. Former Law Clerk to the late United States District Judge Randolph H. Weber, Eastern District of Missouri. Associated with Lewis, Rice, Tucker, Allen and Chubb, St. Louis. Member, St. Louis, Illinois and American Bar Associations. Contributor to various legal publications.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1963 | December, 1963 | Number 4

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published in February, April, June, and December at
Washington University, St. Louis, Mo.

Subscription Price $5.00; Per Single Copy $2.00. A subscriber desiring to discontinue his subscription should send notice to that effect. In the absence of such notice, the subscription will be continued.