CONSTITUTIONAL LAW—SEPARATION OF CHURCH AND STATE—PUBLIC FUNDS FOR THE TRANSPORTATION OF PUPILS TO PRIVATE AND PAROCHIAL SCHOOLS: A NEW QUESTION IN LIGHT OF RECENT DECISIONS

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INTRODUCTION

Several appellate court decisions rendered in recent years[1] point up the fact that the constitutional question of public funds for the transportation of private or parochial school pupils is as yet not fully resolved. There were many who felt that the landmark decision of the Supreme Court in 1946 in the case of *Everson v. Board of Education*[2] once and for all established the constitutionality of the expenditure of such funds. The fact that at least five jurisdictions[3] have found to the contrary since 1946 and that as late as January 1966 the Supreme Court of Delaware[4] expressed a contrary view suggests the timeliness of a review of the question.

PURPOSE

The purpose of this article is to prognosticate the direction the state and federal courts of the United States will probably take in the future in answering this question based on a retrospective study of the decisions of record. It is believed that recent expressions of these courts indicate a trend which will eventually culminate in the overturning of the *Everson* decision.

THE EVERSON CASE

It would seem appropriate to use the *Everson* case as a point of reference from which we could consider cases before *Everson* or cases subsequent to *Everson* in order to show the trend mentioned earlier. The essentials of this case follow. The New Jersey legislature passed a statute[5] providing

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1. Matthews v. Quinton, 362 P.2d 932 (Alk. 1961); Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960); Opinion of the Justices, 216 A.2d 668 (Del. 1966); Quinn v. School Committee, 332 Mass. 410, 125 N.E.2d 410 (1955); McVey v.Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953); Board of Education v. Antone 384 P.2d 911 (Okl. 1963); Visser v. School District, 207 P.2d 198 (Wash., 1949).
2. 330 U.S. 1 (1946).
3. Matthews v. Quinton, 362 P.2d 932 (Alk. 1961); Opinion of the Justices, 216 A.2d 668 (Del. 1966); McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953); Board of Education v. Antone, 384 P.2d 911 (Okl. 1963); Visser v. School District, 207 P.2d 198 (Wash. 1949).
4. Opinion of the Justices, 216 A.2d 668 (Del. 1966).
5. *Supra* n. 2 at 3.

for the reimbursement to parents for funds expended by them in transporting their children to schools by means of public carrier for the school year 1942-1943. It is significant to note here that the monies involved were paid directly to the parents, that the mode of transportation was by public carrier, and that the parents were only paid after they had paid the child's transportation costs.

The highest court of New Jersey determined that the question to be answered here was: Does the statute in question violate the New Jersey Constitution in that it requires ". . . the payment of transportation costs of pupils attending private schools thereby giving direct or indirect aid to sectarian schools or amounts to a gift to an individual?"[6] The court concluded that the statute was not violative of the New Jersey Constitution, relying, without giving the legal doctrine a name, on the "child benefit" theory seemingly first enunciated in *Borden v. Louisiana State Board of Education*,[7] where the court held that the public funds involved were for the benefit of the children with the resulting benefit to the state.

The *Borden* decision was not unanimous, the Justices voting four to three, and was a precursor of things to come. Textbooks were involved in the *Borden* case and the result was that public funds were spent to purchase books for all children regardless of the fact that many students attended parochial schools. The "child benefit"[8] theory, novel in 1929, was soon being successfully argued in many state appellate courts resulting in decisions favorable to private and to parochial schools in Kentucky in 1945[9] and Maryland in 1938,[10] culminating in the *Everson* appeal before the United States Supreme Court in 1946 where this doctrine was upheld by a divided court in a five to four decision.[11]

The Child Benefit Theory

The "child benefit" theory is difficult to explain, but when we study the opinions it becomes quite clear that the central point is that as long as the primary beneficiary of public largesse is the public, then secondary benefits which accrue to a private or parochial institution are either incidental,[12] immaterial,[13] or indirect.[14] The major argument successfully advanced by the "child benefit" theorists is that the protection of school children from the vagaries of weather and the hazards of the highway justi-

6. Everson v. Board of Education, 133 N.J.L. 350, 44 A.2d 333, 337 (N.J. 1945).
7. 168 La. 1005, 123 So. 655 (1929).
8. *Id.* at 660.
9. Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1946).
10. Board of Education v. Wheat, 174 Md. 314, 199 Atl. 628 (1938).
11. *Supra* n. 5.
12. *Supra* n. 10, at 632.
13. Quinn v. School Committee, 332 Mass. 410, 125 N.E.2d 410, 413 (1955).
14. *Supra* n. 9, at 934.

fies this apparent breach of two traditional concepts.[15] First, the historic separation of church[16] and state and secondly, the long established rule that public funds will not be used to support private institutions regardless of whether the institution is eleemosynary or not.[17]

Although there is little merit in counting cases pro or con as far as establishing what the law is, it is interesting to note that subsequent to the *Everson* case this problem has been resolved by seven jurisdictions,[18] five rejecting the "child benefit"[19] theory and two accepting it.[20] One of the latter jurisdictions reported the case of *Quinn v. School Committee*[21] without indicating whether or not the opinion was unanimous in accepting the theory or not. The other case, *Snyder v. Town of Newtown*,[22] is reported as a split decision, the Justices voted four to one in accepting the theory.

THE ENGEL CASE

An overwhelming majority of the cases regarding school transportation since *Everson* have rejected the "child benefit" theory.[23] This is not the primary reason for this author's belief that this argument is meeting with less and less of a receptive judicial audience. The most significant considerations are first the words of Mr. Justice Douglas in the case of *Engel v. Vitale*;[24] secondly, the impact of *Brown v. Board of Education*.[25] Mr. Justice Douglas states in his concurring opinion:

> 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 part of the general program under which the fares of pupils attending public and other schools were also paid. The Everson case in retrospect seems 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. Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy: 'The reasons underlying the Amendment's policy have not vanished with time or diminished in force.'[26]

15. Matthews v. Quinton, 362 P.2d 932, 939 (Alk. 1961); Snyder v. Town of Newtown, 147 Conn. 374, 378, 161 A.2d 770, 774 (1960); Bowker v. Baker, 73 Cal. App.2d 653, (Dist. Ct. App.), 167 P.2d 256, 260 (1946); Board of Education v. Wheat, 174 Md. 314, 322, 199 Atl. 628, 632 (1938).
16. U.S. CONST. amend. I, XIV.
17. Griffin v. Mayor of City of Brooklyn, 4 N.Y. 419 (1851); ROTTSCHAEFER, CONSTITUTIONAL LAW 629 (1939).
18. *Supra* n. 1.
19. *Supra* n. 3.
20. Snyder v. Town of Newtown, *supra* n. 1; Quinn v. School Committee, *supra* n. 1.
21. *Supra* n. 1.
22. *Ibid.*
23. *Supra* n. 7 at 660.
24. 370 U.S. 421, 443 (1962).
25. 347 U.S. 483 (1954).
26. *Supra* n. 24.

These words from one of the senior and most highly regarded members of the Court simply indicate that he has had second thoughts about his concurring opinion in the *Everson* case. It indicates to this author that were a case identical to *Everson* heard before the Supreme Court today that a decision different from that reached in 1946 could certainly result.

The *Engel* case was the landmark decision regarding the Regents Prayer in the New York schools which resulted in a holding prohibiting the saying of a non-denominational prayer in the public schools. Obviously Mr. Justice Douglas, who concurred in that opinion, felt that reason compelled him to question the *Everson* decision or the *Engel* decision.[27] Couldn't it be argued in the *Engel* case that the saying of such prayers is for the benefit of the child's necessary moral education which has traditionally been a function of the school and that the general welfare of the state is enhanced by nurturing and stimulating the growth of the moral fabric of its citizens? Mr. Justice Douglas seems to think freedom of and from religion is important enough to keep churches and schools totally apart, a view shared by the preponderance of the judges whose opinions this author has reviewed and the view of the early legislators in this country is evidenced by an appendix to the opinion of the Supreme Court in the *Everson* case.[28]

It is James Madison's "Memorial and Remonstrance Against Religious Assessments" to "The Honorable The General Assembly of the Commonwealth of Virginia"[29] which states ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment religion, may force him to conform to any other establishment . . . ."[30] This is part of Madison's argument against a bill designed to perpetuate an award of state funds to Church-supported activities. Suffice it to say, his argument won the day and Virginia ceased taxing its citizens for this purpose.

THE LANGUAGE OF THE COURTS

In view of the historical background of this problem some of the comments of the courts upholding the "child benefit"[31] theory are of interest.

27. *Ibid.*
28. *Supra* n. 2 at 63.
29. *Ibid.*
30. *Id.* at 65. "Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson to much, soon to forget it.. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"
31. *Supra* n. 7 at 660.

In *Board of Education v. Wheat*[32] the Court disposes of the conflict by stating:

> This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36, Declaration of Rights. The religious institution must be considered as aided incidentally, the aid only a byproduct of proper legislative action.[33]

In *Bowker v. Baker,*[34] the question involved a resolution passed to provide parochial school children transportation "only as a measure to relieve the present war emergency situation . . . ."[35] The court passes over this issue completely, simply stating: ". . . we will confine ourselves to this one issue (not the fact that the necessity was one that could not reasonably be circumvented due to the war) unless it becomes necessary to consider the bearing on the case of the fact that the resolution was a temporary measure. . . ."[36] In *Nichols v. Henry,*[37] the court appellate of Kentucky disposes of the problem by obliquely approaching the issue and stating: "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. . . ." This law provided free public transportation of parochial school children to the school of their choice in Kentucky.[38]

As to the other side of the argument let us examine what the majority have to say about the benefits which accrue to private and parochial schools. In *Judd v. Board of Education,*[39] probably the leading case prior to *Everson* and the most frequently cited authority against the "child benefit"[40] theory, it was said by the court that this theory is ". . . utterly without substance . . ."[41] and further:

> As Judge Pound aptly said in People ex. rel. Lewis v. Granes . . . 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.' We furnish free common schools suitable for all children. . . . Any contribution directly or indirectly made in the aid of the maintenance and suport of any private or sectarian school out of public funds would be a violation of the Concept of Complete separation of Church and State in Civil affairs and of the spirit and mandate of our fundamental law.[42]

32. 174 Md. 314, 199 Atl. 628, 632 (1938).
33. *Ibid.*
34. 73 Cal. App.2d 653 (Dist. Ct. App.), 167 P.2d 256, 257 (1946).
35. *Ibid.*
36. *Ibid.*
37. 301 Ky. 434, 191 S.W.2d 930 (1946).
38. *Id.* at 935.
39. 278 N.Y. 200, 15 N.E.2d 577 (1938).
40. *Supra* n. 7 at 660.
41. *Supra* n. 39 at 583.
42. *Ibid.*

The court held that "Aid furnished 'indirectly' clearly embraces any contribution to whomsoever made, circuitously, collatorally, disguised or otherwise. . . ."[43] It further held that these contributions were to be included within the New York Constitution proscribing such indirect aid. In *Gurney v. Ferguson*,[44] the opinion states "The appropriation and directed use of public funds in transportation of public school children is openly in direct aid to public schools as such."[45] The opinion then asks why, when we provide the same type funds for the transport of parochial school children, the funds suddenly become aid to children instead of parochial schools. In *Visser v. Nooksack Valley School District*[46] the *Judd* opinion is also quoted effectively where the court says:

> The purpose of the transportation is to promote the interests of the private or religious or sectarian institution that controls or directs it. 'It helps build up, strengthen and make successful the schools as organizations.' Without pupils there would be no schools. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books . . . are such an aid.[47]

These samples of the opinions rejecting the "child benefit"[48] theory are typical and are convincing not only to the writer but to many of the appellate courts hearing these arguments.[49]

A consideration of this problem is not complete without considering another Supreme Court decision. *Brown v. Board of Education*[50] in effect prohibited segregation in publicly supported schools. In this writer's opinion, many private schools have grown and many new ones have been founded in order to perpetuate some degree of racial segregation as a result of this decision. The apparent problem is that many of the private segregated schools are recipients of public largesse through free public transportation to these schools. The Supreme Court now finds itself impaled on the horns of a dilemma of its own creation.

An examination of the language used by the Court in the *Brown* case makes it eminently clear that the decrees issued involved only public schools. The opinion never fails to modify "school" with the adjective "public." Mr. Chief Justice Warren states in concluding his opinion ". . . the primary question is the constitutionality of racial segregation in *public* education. We have now announced that such segregation is a denial of the equal protection of the laws. . . ."[51] This language is clear and concise and difficulty of interpretation is virtually impossible.

43. *Ibid.*
44. 122 P.2d 1002 (Okl. 1941).
45. *Id.* at 1004.
46. 207 P.2d 198 (Wash. 1949).
47. *Id.* at 203.
48. *Supra* n. 7 at 660.
49. *Supra* n. 3.
50. 347 U.S. 483 (1954).
51. *Id.* at 495.

The result of the *Everson* case when viewed in light of the *Brown* case could be summed up by saying that where a state statute provides for the expenditure of public funds to transport children to and from private or parochial schools, we are forced to subsidize racial segregation because all children benefit from this gratuity from the state; or we must violate the *Everson* holding and deny these benefits to children in private or parochial segregated schools; or as a possible third solution we must force integration of private and parochial schools receiving these funds. It seems obvious to this writer that both the first and third solutions are totally unacceptable. It is inconceivable that the judiciary would permit what is in effect a subsidization of segregation and, just as foreign to reason, that private rights of free assembly would be abrogated by an enlightened bench, who would have to rule so, if they forced the integration of private schools.

SUMMARY AND CONCLUSION

"Hard cases make bad law" is a cliche much overworked, but this writer cannot conceive of a situation where it is more applicable than in the one discussed here. One author has shown the magnitude of the problem quite vividly when he states that approximately 6,000,000 American children were attending Roman Catholic schools in 1961.[52] That figure does not include those attending parochial schools operated by other religious denominations, nor does it include those attending non-sectarian private non-profit schools nor those attending institutions operated for profit. We must also take cognizance of the fact that these figures are six years old.

An indication of the number of pupils which are presently involved in the Roman Catholic segment of the problem can be ascertained roughly by using the figures supplied by that church in 1960 indicating that 12.56% of the total United States enrollment was enrolled in those church schools at that time.[53]

The scope of the dilemma becomes even more obvious when we add to the facts already mentioned that in 1961 seventeen states[54] provided transportation for public, private and parochial school pupils on essentially the same terms. In California, Connecticut, Kentucky, Massachusetts, Maryland and New Jersey the legislation providing this transportation has been held valid in appellate courts where the issue has been raised.[55] Eleven states providing this indiscriminate transportation have not had the constitutionality of the legislation tested;[56] and New York and New Jersey

52. McKenna, *The Transportation of Private and Parochial School Children at Public Expense*, 35 TEMP. L.Q. 259, 260 (1962).
53. *Id.* at 261.
54. *Id.* at 260. California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, West Virginia.
55. *Id.* at 260.
56. *Id.* at 260. Alabama, Arkansas, Colorado. Illinois, Indiana, Kansas, Louisiana, Michigan, New Hampshire, Oregon nd Rhode Island.

have passed constitutional amendments permitting such transportation.[57] In eight states similar legislation has been held unconstitutional.[58] Combining these figures we find that twenty-eight states do not provide transportation with five states providing it under narrow and restrictive circumstances. We find further that eight states where the question has been raised rejected free carriage, and six have upheld it.

The state of Pennsylvania enacted legislation permitting the free transportation of private and parochial school children to school in 1965. It will be interesting to see the results of the inevitable litigation in that state concerning this enactment, particularly in view of the fact that over 39 per cent of the students in Philadelphia are attending parochial schools.[59]

> One commentator expressed this writer's opinion when he said: The relatively recent 'school prayer' cases [*School Dist. v. Schempp* . . . and *Engel v. Vitale* . . .] seemingly have heightened the 'wall between church and state' by declaring that official prayers, the Lord's Prayer and bible reading in public schools exceed the constitutional limitations. . . .[60]

As this wall continues to rise by process of adjudication, the *Everson* holding becomes more and more untenable.

In summary, we see a strong majority of cases since *Everson* in effect rejecting the "child benefit" theory and holding contrary to it. We see the opinion in the *Everson* case repudiated by an eminent senior Supreme Court Justice, and upon examination we find the language expressed by the majority in that decision does not stand critical examination.

In brief, we find the tide turning in favor of Mr. Justice Stewart's classic dissent in the *Everson* case where he remarked:

> The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the majority opinion, advocating complete and uncompromising separation of Church and State, seems utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistably comes to mind as the most fitting precedent is that of Julia, who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented'.[61]

This author thinks the lady is about to change her mind.

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57. *Id.* at 260.
58. *Id.* at 261. Wisconsin, Delaware, New York, Oklahoma, Kentucky, Washington, Missouri, Alaska.
59. TIEDT, THE ROLE OF THE FEDERAL GOVERNMENT IN EDUCATION 126 (1966).
60. Schwartz, *The School Bus Law: Transportation of Parochial and Private School Pupils in Pennsylvania,* 27 U. PITT. L. REV. 71, 80 (1965).
61. 330 U.S. 1 (1946).