

HJR

45

Alaska State Legislature



While in Session:
State Capitol Building
Juneau, Alaska 99801-1182
907-465-3719

Interim:
119 N. Cushman
Suite 211
Fairbanks, Alaska 99701
907-456-5081

Representative Al Vezey

SPONSOR STATEMENT

Some private schools have received funds from their respective public school districts for pupil transportation.

Last year, The Kenai Peninsular Borough requested a route extension, to serve a non public school. The Department of Education would not allow this extension. DOE cited two court cases; Matthews vs Quinton, (1961), Sheldon Jackson vs the State of Alaska (1972) and two Attorney General opinion's; Ron Lawrence (1978) and Avrum Gross (1979), which stated that public money cannot be spent for the purposes of benefiting private or religious schools or those schools which are under sectarian control. The Supreme Court cited Article VII, sec. 1, Constitution of the State of Alaska, in these rulings and the Attorney General opinion's reaffirmed the courts decision.

Attorney General, Charles Cole issued a verbal ruling which agreed with the DOE, previous Attorney General rulings and court cases.

This action precipitated transportation funding being withdrawn from Monroe Catholic High School in Fairbanks.

Monroe Catholic High School then sued the Fairbanks North Star Borough School District. Judge Richard Savell has issued an injunction staying the withdrawal of these funds until such time as the court issues a ruling.

The Attorney General's office has said that the Alaska Supreme Court verbally stated that if this issue were to be brought to their attention again, they may rule differently than the ruling in Matthews vs Quinton. So far, all we have is this verbal statement, the court has not acted.

We have a statewide problem that needs to be addressed. If the Attorney General's ruling is allowed to stand, many students that are attending private or religious schools may have to leave and return to the public school system. This influx of children will only exacerbate the funding problems that already exist in a time of decreasing state revenue.

Private schools in the State of Alaska make a significant contribution to quality education. This allows the limited financial resources available for public education to be spread among fewer students. We cannot afford to lose this valuable resource.

The essence of this subject is whether we as a legislature are going to allow the courts to determine how we allocate limited educational resources or if the people would prefer that elected officials determine how education is funded. I have submitted HJR-45 in an attempt to solve this problem. This bill seems to me, to be a reasonable solution to a constantly occurring problem.

Peninsula Borough v. State, 743 P.2d 1352 (Alaska 1987).

Reapportionment matter is considered de novo on appeal. — In reviewing a reapportionment plan the supreme court will consider the matter de novo upon the

record developed in the superior court. Groh v. Egan, 526 P.2d 863 (Alaska 1974).

Stated in Wade v. Nolan, 414 P.2d 689 (Alaska 1966).

Cited in Egan v. Hammond, 502 P.2d 856 (Alaska 1972).

Article VII

Health, Education and Welfare

Section 1. Public Education. The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

Opinions of attorney general. — There is neither constitutional nor statutory prohibition to the exercise of discretion by the commissioner of education, or by the respective school district authorities, in allowing secular and religious organizations to rent school buildings during nonschool hours. 1966 Op. Att'y Gen. No. 3.

This section would apply only in those cases where the school districts are providing a direct benefit to a religious or private institution by rental of school buildings during nonschool hours. 1966 Op. Att'y Gen. No. 3.

If the rate for religious groups renting a

school building during nonschool hours is substantially lower than the rate for secular groups, the difference would be a gift of school property resulting in a "direct benefit" and would be an improper use of money raised by taxation. 1966 Op. Att'y Gen. No. 3.

Borough funds are clearly "public funds" within the meaning of these constitutional provisions. 1980 Op. Att'y Gen. No. 6.

Secondary education fund created by ordinance in a borough constituted an appropriation of public funds expended for direct benefit of a private education institution. 1980 Op. Att'y Gen. No. 6.

NOTES TO DECISIONS

Intent of section. — This section was intended to ensure that the legislature establish a system of education designed to serve children of all racial backgrounds. Hootch v. Alaska State-Operated Sch. Sys., 536 P.2d 793 (Alaska 1975).

This section guarantees all children of Alaska a right to public education. Breese v. Smith, 501 P.2d 159 (Alaska 1972).

Education is a matter of statewide concern. Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971).

This section was designed to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental indifference to any student choosing to be educated outside the public school system. Sheldon Jackson

College v. State, 599 P.2d 127 (Alaska 1979).

Section constitutes mandate for pervasive state authority in field of education. — The constitutional mandate of this section for pervasive state authority in the field of education could not be more clear. First, the language is mandatory, not permissive. Second, this section not only requires that the legislature "establish" a school system but also gives to that body the continuing obligation to "maintain" the system. Finally, the provision is unqualified; no other unit of government shares responsibility or authority. Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971).

The Alaska Constitution, as interpreted by the supreme court, provides a clear

mandate for pervasive state authority in the field of education. *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67 (Alaska 1980).

Effect of delegating certain educational functions to local boards. — That the legislature has seen fit to delegate certain educational functions to local boards in order that Alaska schools might be adapted to meet the varying conditions of different localities does not diminish constitutionally mandated state control over education under this section. *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971).

History of public education in Alaska. — See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Provision for education of Alaskan children is governed in the first instance by this section, which directs the legislature to establish and maintain a system of public schools. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

This section imposes a duty upon the state legislature. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

And it confers upon Alaska school age children a right to education. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Title 14 of the Alaska statutes has been enacted pursuant to this section. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The reference to all children of the state in this section seems to have been designed to elevate to constitutional status the consensus that Alaska's pre-statehood dual system of education should be ended. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Uniformity in school system not required. — Unlike most state constitutions, the Constitution of Alaska does not require uniformity in the school system. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

In this section, the Alaska Constitution appears to contemplate different types of educational opportunities including boarding, correspondence and other programs without requiring that all options be available to all students. *Hootch v. Alaska State-Operated Sch. Sys.* 536 P.2d 793 (Alaska 1975).

The contemplation in this section of some differences in the manner of provid-

ing education sanctions some disadvantages. So long as they are not violative of equal protection, the nature and proper means of overcoming the disadvantages present questions for the legislature. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The phrase "open to all" appears in lieu of the customary uniformity requirements. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The word "open" in this section is an integral part of a unitary phrase "open to all." *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Inclusion of the word "open" does not appear to impart a different meaning to the section than would "for all," "available to all," or "providing education to all." *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

This section has no meaning with the word "open" deleted. Some word is needed to complete the thought of the section. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The right to attend secondary schools in the students' communities of residence is not mandated by the constitution, absent a valid equal protection claim. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Notice of schools subject to closure. — A five-day notice of which schools in a school district are subject to closure militates against appropriate preparation and poses serious obstacles to the presentation of persuasive, properly researched, and supported opposition to any closure plan. It also lessens the likelihood of a fair hearing before the school board and of the school board reaching a reasoned administrative decision. *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67 (Alaska 1980).

The importance of the educational and property interests involved in the closure of neighborhood schools in a school district requires adequate notice of the school board meeting at which the decision was made to close a specific school and five-day notice of the meeting is insufficient. *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67 (Alaska 1980).

Ban on direct religious benefits. — The Alaska Constitution is apparently unique in its express ban only on "direct" benefits. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

Words "or indirect" not included in last sentence. — The minus of the con-

stitutional convention reveal that the Committee on Health, Education and Welfare Provisions, in drafting the last sentence of this section, considered the words "direct" and "indirect" and felt that the words "or indirect" after the word "direct" should not be used for the reason that "they would reach out to infinity practically" and shut out the children in private schools from such free care as was being given by the state welfare department to all children. *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

Institutions covered by direct benefit clause. — The direct benefit clause was meant to apply to all private educational institutions, including colleges and universities, as well as primary and secondary private educational institutions. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

No distinction is made between "general funds" and "funds for the support of free schools." The proscription in this section is against the appropriation of "any public money." *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

Transportation of school children to nonpublic schools at public expense would be in contravention of the state constitution. *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

The delegates to the constitutional convention and the people who by their vote ratified the constitution left it to the supreme court to decide whether free transportation of children to nonpublic schools would constitute a "direct" benefit to the schools. If they had intended otherwise, the framers of the constitution would have followed the example set by the people of New York and New Jersey and settled the controversial issue by providing in the constitution itself for transportation of school children to nonpublic schools at state expense. *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

Tuition grant program held unconstitutional. — Alaska's tuition grant program, in art. 9 of AS 14.40, which awarded Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student's private

college and the tuition charged by a public college in the same area, not to exceed \$2,500.00 annually, and which required the student to apply the entire amount of the grant towards his or her tuition, was in its effect a direct benefit to private educational institutions and therefore violated this section. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

Since the class primarily benefitted by the tuition grant program in art. 9 of AS 14.40 consisted only of private colleges and their students, the public funds expended under former AS 14.40.776 constituted nothing less than a subsidy of the education received by the student at his or her private college, and the tuition grant program violated the final sentence of this section, prohibiting the payment of money from public funds "for the direct benefit of any religious or other private educational institution." *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

Home rule borough requiring centralized accounting. — A home rule borough may not require its school system to participate in centralized accounting without the statutorily required approval of the school board. *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971).

Issues subject to collective bargaining between teachers' associations and school districts and boroughs. — See *Kenai Peninsula Borough Sch. Dist. v. Kenai Peninsula Educ. Ass'n*, 572 P.2d 416 (Alaska 1977).

Comparison of Alaska provision with those in other states. — See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Analytic distinction between arguments under this section and equal protection arguments. — See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Borough was not acting as an agent of the state in furnishing transportation of pupils. *Kenai Peninsula Borough v. State*, 532 P.2d 1019 (Alaska 1975).

While the state did supervise the school transportation service insofar as it related to the funding provided by it and also had certain regulations in effect pertaining to the over-all safety of the transportation system, the actual control of the transportation services was undertaken by the borough which, on its own behalf, entered into the contract with a school bus owner to furnish transportation service for specified routes. *Kenai Peninsula Borough v. State*, 532 P.2d 1019 (Alaska 1975).

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

OPINION NO. 23

JAY S. HAMMOND, GOVERNOR

POUCH K - STATE CAPITOL
JUNEAU 99811

June 12, 1978

JAN 1 9 1984

JAN 1 9 1984

The Honorable John C. Sackett
State Senator
Chairman, Senate Finance Committee
Pouch V
Juneau, Alaska 99801

Re: Bussing of Private School Children,
A.G. File No. J-66-761-78

Dear Senator Sackett:

This will confirm the oral advice provided to you and the Senate Finance Committee on June 7, 1978 by this department in response to your question as to whether an Alaska court decision or Attorney General's opinion has ever been issued on the constitutionality of the State of Alaska providing public funds for the bussing of private school children. As we indicated on June 7, the answer to your question is "yes". The Alaska Supreme Court issued a decision in 1961, Matthews v. Quinton, 362 P.2d 932, which stated that the use of public funds to provide bussing for children attending private schools violated the provision of Art. VII, §1 of the Alaska Constitution which states:

No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The Matthews decision involved a challenge to the validity of a territorial statute, ch. 39 SLA 1955, which required that transportation "be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools which are administered in conformity with [territorial law], where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported." Despite the Alaska Supreme Court's 1961 decision in Matthews, in 1972 the Legislature adopted a new statute providing for bussing of private school children, AS 14.09.020, the language of which is nearly identical to that contained in the judicially invalidated 1955 territorial statute. We are unaware of the Legislature's reasons for essentially re-enacting the prior statute, however we surmise that it intended to precipitate a new confrontation on the bussing question in the courts, the apparent hope being that a judicial reconsideration of the matter might lead to the overruling of the 1961 decision. This confrontation has yet to materialize, however, and until our Supreme Court issues a decision overruling Matthews or

The Honorable John C. Sackett
State Senator

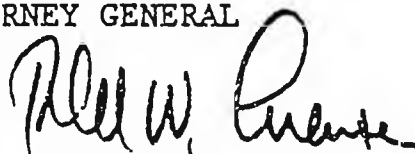
Page 3
June 12, 1978

modifying it in a significant manner, the law in the state is that public funds may not be used to provide transportation to private school children.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By:



Ronald W. Lorensen
Assistant Attorney General

RWL:lw

* As we indicated at the Finance Committee meeting, the Supreme Court will be reviewing Matthews shortly when it considers whether the state's tuition grant program under AS 14.40.751-14.40.806 is constitutional under Art. VII, §1.

State of Alaska
Department of Education
Office of Data Management

FY94 Religious, Private and Home School Enrollment By District and Grade
As of December 15, 1993

District Name	Graded														Ungraded			TOTAL
	Pre- Elem	KG	1	2	3	4	5	6	7	8	9	10	11	12	Pre- Elem	KG-8	9-12	
Adak Region Schools	0	1	1	2	0	2	1	1	0	0	1	0	0	0	0	0	0	9
Alaska Gateway Schools	0	0	0	0	1	1	1	0	1	0	1	0	0	0	0	0	0	5
Alutian Region Schools	0	0	1	1	2	0	0	0	1	0	0	0	0	0	0	0	0	5
Alutians East Borough	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	0	2
Anchorage School District	17	175	111	109	132	91	109	118	79	66	63	47	33	10	160	156	24	1,503
Annette Island Schools	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	16	3	19
Barrow Borough Schools	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
Bristol Bay Borough	0	0	0	0	0	1	0	1	0	0	1	0	0	0	0	0	0	3
Burien Borough Schools	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	2
Copper River Schools	0	0	1	2	1	3	3	1	3	1	3	1	2	2	0	0	0	27
Cordova City Schools	1	1	0	0	0	0	1	0	2	1	0	1	0	0	0	1	0	8
Craig City Schools	1	3	0	0	1	0	1	0	0	0	0	0	0	0	0	0	0	3
Delta/Grady Schools	0	4	9	5	9	5	9	9	9	7	12	9	12	4	0	0	2	105
Denali Borough Schools	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	2
Dillingham City Schools	0	0	1	1	0	1	0	0	0	0	0	0	0	0	0	0	0	3
Fairbanks North Star	20	116	134	120	117	125	104	108	113	107	76	79	68	43	0	12	140	1,490
Fairbanks City School District	0	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	2
Fairbanks Borough Schools	1	3	9	7	8	4	8	0	2	0	4	0	3	2	0	1	0	52
Farmington City Schools	0	0	1	3	1	2	2	2	4	2	0	3	0	1	0	0	0	21
Fennell Borough Schools	20	9	5	11	21	15	9	21	9	4	4	0	0	0	0	5	1	134
Finn Ronneburg Borough	0	17	15	14	20	25	14	23	12	20	8	15	4	1	0	0	0	199
Fitchburg Gateway Borough Schools	33	10	7	14	9	6	7	12	0	0	0	0	0	0	15	63	9	185
Galena Island Borough	37	40	33	26	28	37	25	21	29	7	0	0	0	0	0	4	0	207
Gaillard Peninsula Schools	0	0	2	0	1	0	0	0	0	0	0	0	0	0	0	0	0	3
Lower Yukon Schools	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Mat-Su Borough Schools	26	20	37	34	43	34	25	42	37	24	38	15	15	8	0	16	12	412
McCarthy City Schools	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	2
North Slope Borough	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Sitka School District	23	7	6	6	2	2	6	6	2	2	0	2	0	0	0	0	0	65
Skagway City School	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
Southeast Island Schools	0	0	0	0	1	2	0	0	0	1	0	0	0	0	0	0	0	4
Talkeetna City School District	0	0	0	0	1	0	1	1	1	0	0	0	0	0	0	0	0	4
Talkeetna City Schools	0	0	0	0	1	1	0	1	1	0	0	0	0	0	0	0	0	4
Tukutat School District	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	8
Tukutat Flats Schools	0	2	0	0	0	2	2	1	0	0	1	1	0	0	0	0	0	9
STATE TOTAL:	179	416	375	356	409	360	330	370	302	243	192	170	137	79	176	287	200	4,581

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To Dale Brandt	From Bob Silverman
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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HJR 45

Revision Date: _____ Department Affected: Office of the Governor
 Title: Amendment to the Constitution RE: BRU: Division of Elections
Control & funding of public & private school. Component: General and Primary Elections
 Sponsor: Reps. Vezey, Sanders & James
 Requestor: _____ COMPONENT SERIAL NO. 22

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	2.2*	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND &	0	0	0	0	0	0
GRANTS.	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE						
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FUNDING:

1002 Federal	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	2.2*	0	0	0	0	0
1005 GF/Program	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY94) impact: 0

ANALYSIS: (Attach a separate page if necessary.) *This figure covers cost of inclusion of information about this issue in the Official Elections Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on the measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be 53.4.

Prepared by: Joseph E. Swanson, Director Phone: 465-4811
 Division: Division of Elections Date: 1-18-94

Approved by Commissioner: Lt. Governor John B. Coghill
 Agency: Office of the Lt. Governor Date: 1-18-94

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 Rev 12/93 Page 1 of 1

SHELDON JACKSON COLLEGE,
Appellant,

v.

STATE of Alaska, Avrum Gross, Attorney General for the State of Alaska, B. B. Allen, Commissioner of Administration for the State of Alaska, Kerry Romesburg, Executive Director, Post-Secondary Education Commission, Marshall L. Lind, Commissioner of Education for the State of Alaska, Appellees.

INUPIAT UNIVERSITY OF the
ARCTIC, Appellant,

v.

STATE of Alaska, Avrum Gross, Attorney General for the State of Alaska, B. B. Allen, Commissioner of Administration for the State of Alaska, Kerry Romesburg, Executive Director, Post-Secondary Education Commission, Marshall L. Lind, Commissioner of Education for the State of Alaska, Appellees.

Nos. 3978, 4002.

Supreme Court of Alaska.

Aug. 28, 1979.

Private educational institution filed suit to enjoin an order of the Department of Administration prohibiting the tuition grants. A summary judgment was granted to the State by the Superior Court, First Judicial District, Thomas B. Stewart, J., and, on appeal by the college, the Supreme Court, Matthews, J., held that State's tuition grant program awarding state residents attending private colleges in State an amount generally equal to difference between tuition charged by student's private college and tuition charged by public college in same area, not to exceed \$2,500 annually, is not neutral and is, in its effect, direct benefit to private educational institutions and therefore violative of state constitutional prohibition upon payment of money from public funds for direct benefit of

religious or other private educational institution.

Affirmed.

1. Schools ⇌ 157

Constitution was intended to support and protect strong system of public schools but not to prevent State from providing for health and welfare of private school students or from focusing on special needs of individual residents. AS 14.40.750-14.40.806, 14.40.776(a); Const. art. 1, § 4; art. 7, §§ 1, 7; art. 9, § 6.

2. Schools ⇌ 11

Public education section of State Constitution was designed to commit State to pursuit of public, not private, education, without requiring absolute governmental indifference to any student choosing to be educated outside public school system. Const. art. 7, § 1.

3. Schools ⇌ 3

In determining constitutionality of program of state aid for private schools, court must consider breadth of class to which statutory benefits are directed, nature of use to which public funds are to be put, and magnitude of benefits conferred. AS 14.40.750-14.40.806, 14.40.776(a); Const. art. 1, § 4; art. 7, §§ 1, 7; art. 9, § 6.

4. Schools ⇌ 3

Direct transfer of funds from state to private school will render program constitutionally suspect, but merely channeling funds through intermediary will not save otherwise improper expenditure of public moneys. AS 14.40.750-14.40.806, 14.40.776(a); Const. art. 1, § 4; art. 7, §§ 1, 7; art. 9, § 6.

5. Colleges and Universities ⇌ 2

Constitutional Law ⇌ 84

States ⇌ 119

State's tuition grant program awarding state residents attending private colleges in State an amount generally equal to difference between tuition charged by student's private college and tuition charged by public college in same area, not to exceed \$2,500 annually, is not neutral and is, in its

effect, direct benefit to private educational institutions and therefore violative of state constitutional prohibition upon payment of money from public funds for direct benefit of religious or other private educational institution. AS 14.40.750-14.40.806, 14.40.776, 14.40.776(a), (a)(2), 14.40.786; Const. art. 1, § 4; art. 7, §§ 1, 7; art. 9, § 6.

Monte L. Brice, Ely, Guess & Rudd, Juneau, for Sheldon Jackson.

B. Richard Edwards, Mark S. Bledsoe, Anchorage, for Inupiat University of the Arctic.

Ronald W. Lorensen, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellees.

Robert C. Erwin, Sanford M. Gibbs of Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for amicus curiae.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

The final sentence of article VII, section 1 of our state constitution prohibits the payment of money from public funds "for the direct benefit of any religious or other private educational institution."¹ The question in this case is whether Alaska's

1. Art. VII, § 1 of the Alaska Const. provides:

Public Education. The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

2. The proposition would have appended the following language to art. VII, § 1: "however nothing in this section shall prevent direct aid to students in accordance with the law." 1976

tuition grant program, AS 14.40.751-806, violates this provision.

The tuition grant program awards Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student's private college and the tuition charged by a public college in the same area, not to exceed \$2,500.00 annually. The student is required to apply the entire amount of the grant towards his or her tuition. AS 14.40.776(a).

In May of 1976 the attorney general issued an opinion declaring tuition grants to be invalid as a direct benefit to private schools in violation of article VII, section 1. The Department of Administration then stopped paying tuition grants. Appellant Sheldon Jackson College, a private educational institution, filed suit to enjoin the department's termination order, but agreed to dismiss the suit without prejudice when a proposition to amend article VII, section 1, to permit tuition grants was placed on the ballot to be voted on in the general election of November, 1976.²

The ballot proposition was rejected by the voters 64,211 to 54,636. Sheldon Jackson then renewed its lawsuit and another private university, Inupiat University of the Arctic, filed a complaint in intervention. The superior court concluded that the tuition grant program provides direct benefits to private educational institutions and thus violates article VII, section 1. Summary judgment was thereupon granted in favor of the state. We affirm.

House Joint Resolution 73 am S. In addition an explanation of the amendment appeared on the ballot as follows:

This is a proposal to amend Article VII, Section 1 of the Constitution of the State of Alaska to allow public funds to be used to provide direct aid such as scholarships and tuition equalization grants to students attending private educational institutions. The Attorney General of the State of Alaska has interpreted Article VII, Section 1 of the constitution as it now reads, to prohibit the state from giving tuition equalization grants to students attending private colleges or universities in the state.

I

[1, 2] The minutes of the Alaska Constitutional Convention show that an unsuccessful motion was made to delete entirely the direct benefit prohibition of article VII, section 1.³ The proponent of the motion argued that the state constitutional provisions prohibiting the establishment of religion⁴ and prohibiting spending public funds for private purposes,⁵ were sufficient to accomplish the objectives of the direct benefit clause. By rejecting this proposal the convention made it clear that it wished the constitution to support and protect a strong system of public schools.⁶ Other authorities have also suggested that a constitutional provision barring aid to all private schools serves to enforce the separation of church and state without requiring executive or judicial inquiry into the sectarian affiliation of particular schools,⁷ and furthermore disengages the state from the undesirable task of withholding benefits solely on the basis of religious affiliation.⁸

3. 2 Proceedings of the Alaska Constitutional Convention 1526-28 (hereafter cited as Proceedings).

4. Art. I, § 4 provides in part: "No law shall be made respecting an establishment of religion . . ."

5. Art. IX, § 6 provides: "No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."

6. For example, delegate Armstrong, speaking for the committee which drafted art. VII, § 7, stated that it had sought to "provide and protect for the future of our public schools." 2 Proceedings at 1514. Delegate Coghill expressed the thought that the amount of tax dollars available for the support of public schools might be lessened if public funds were used to support a great many private schools. *Id.* at 1520. In *Spears v. Honda*, 51 Haw. 103, 449 P.2d 130, 135 (1968), the need to ensure that public schools would not be neglected is expressed as the reason underlying Hawaii's constitutional bar to public aid of private schools. Hawaii, however, apparently had an elite private school system, a system having no strong parallels in the Territory of Alaska.

7. See *Gaffney v. State Bd. of Educ.*, 102 Neb. 358, 220 N.W.2d 550, 553 (1974).

At the same time, in expressly rejecting alternative language that would have prohibited "direct or indirect benefits,"⁹ the delegates to Alaska's Constitutional Convention made it abundantly clear that they did not wish to prevent the state from providing for the health and welfare of private school students,¹⁰ or from focusing on the special needs of individual residents.¹¹ Article VII, section 1 was thus designed to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental indifference to any student choosing to be educated outside the public school system.

The Alaska Constitution is apparently unique in its express ban only on "direct" benefits. However, in construing state constitutional provisions that prohibit "support" for private schools,¹² or state and federal proscriptions against the establishment of religion,¹³ the courts have frequently resorted to a distinction between "direct" and "incidental" benefits.¹⁴ Though the distinction may at times appear more "metaphysi-

8. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 67 S.Ct. 504, 511, 91 L.Ed. 711, 724 (1947); *Spears v. Honda*, 51 Haw. 103, 449 P.2d 130, 137 (1968).

9. 2 Proceedings, *supra* note 3 at 1528.

10. *Id.* at 1513-16, 1519-20, 1521-22, 1524.

11. *Id.* at 1514.

12. E.g., Mo. Const. art. IX, § 8.

13. U.S. Const. amend. I provides in part: "Congress shall make no law respecting an establishment of religion . . ."

14. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 250, 254, 97 S.Ct. 2583, 2606, 2609, 53 L.Ed.2d 714, 733 (1977); *Meek v. Pittenger*, 421 U.S. 349, 364-65, 95 S.Ct. 1753, 1762-63, 44 L.Ed.2d 219, 231 (1975); *Comm. for Publ. Educ. v. Nyquist*, 413 U.S. 756, 783 n. 39, 93 S.Ct. 2955, 2971 n. 39, 37 L.Ed.2d 948, 969 n. 39 (1973); *Americans United v. Rogers*, 538 S.W.2d 711, 719 (Mo.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976). Though the Federal Constitution does not explicitly refer to the relationship between the government and religious schools, the Supreme Court's "direct benefit" standard has been formulated almost exclusively in the context of school aid cases, *supra*, and is thus valuable precedent in construing our own constitutional provision.

cal" than precise,¹⁵ the analyses found in these decisions are helpful in determining generally the type of government action intended to be prohibited by article VII's direct benefit clause. The following generalizations can be drawn from these authorities.

[3] First, constitutional provisions governing aid to private schools have generally been perceived as requiring neutrality rather than hostility from the state;¹⁶ thus the breadth of the class to which statutory benefits are directed is a critical area of judicial scrutiny.¹⁷ For example, though the police and fire protection afforded a private school may provide the school with quite direct benefits, as when a campus fire is extinguished, such benefits are provided without regard to status and affiliation, and have universally been presumed to be constitutional.¹⁸ Conversely, a benefit flowing only to private institutions, or to those served by them, does not reflect the same neutrality and non-selectivity.¹⁹

A second central criterion in determining the constitutionality of a state aid program, is the nature of the use to which the public funds are to be put. As is apparent from the convention debate, the core of the concern expressed in the direct benefit prohibition involves government aid to education

conducted outside the public schools. Though any state assistance that relieves the burden on a private school to provide for the health and welfare of its students will free the school to concentrate its funds on its private educational mission, numerous delegates voiced their understanding that the direct benefit clause would not bar such incidental support.²⁰ An analogous distinction has frequently been drawn in establishment clause cases, where the pertinent inquiry is whether a statute impacts "essentially secular educational functions" that are separable from the school's religious instruction.²¹

Third, in determining whether a school is directly benefitted by public funds, a court must consider, though not in isolation, the magnitude of the benefit conferred. A trivial, though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may.²²

[4] Finally, while a direct transfer of funds from the state to a private school will of course render a program constitutionally suspect,²³ merely channeling the funds through an intermediary will not save an otherwise improper expenditure of public monies. The courts have expressly noted

buses at public expense, was held violative of the direct benefit prohibition. We do not rely on *Matthews* in reaching today's decision, and thus have no occasion to overrule or re-affirm it. A substantial question, however, can be raised as to its continuing vitality in light of the analysis which we employ in the present opinion.

15. See L. Tribe, *American Constitutional Law* 840 (1978).

16. See *Roemer v. Bd. of Publ. Works of Md.*, 426 U.S. 736, 747, 96 S.Ct. 2337, 2345, 49 L.Ed. 179, 188 (1976); *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745, 756 (1971); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18, 67 S.Ct. 504, 512, 91 L.Ed. 714, 724-25 (1947).

17. See, e.g., *Comm. for Publ. Educ. v. Nyquist*, 413 U.S. 756, 782 n. 38, 93 S.Ct. 2955, 2970 n. 38, 37 L.Ed.2d 948, 968 n. 38 (1973); *Springfield Schl. Dist. v. Dept. of Educ.*, 483 Pa. 539, 397 A.2d 1154, 1163 (1979).

18. See citations *supra* notes 16 and 17.

19. See *infra* notes 26 and 27.

20. See *supra* note 10. In *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); cert. denied, 368 U.S. 517, 82 S.Ct. 530, 7 L.Ed.2d 522 (1962), a statute enabling private school children living far from their schools to ride public school

21. *Roemer v. Bd. of Publ. Works of Md.*, 426 U.S. 736, 762, 96 S.Ct. 2337, 2352, 49 L.Ed.2d 179, 197 (1976). See *Meek v. Pittenger*, 421 U.S. 349, 366, 95 S.Ct. 1753, 1763, 44 L.Ed.2d 217, 232 (1975).

22. Compare *Lendall v. Cook*, 432 F.Supp. 971 (E.D.Ark.1977) (program involving eight scholarships upheld), with *Meek v. Pittenger* (striking down a state loan of nonideological instructional materials, in part on the basis of the substantiality of aid to the overall functioning of the benefitted schools).

23. *Id.*

that the superficial form of a benefit will not suffice to define its substantive character.²⁴

II

[5] The foregoing observations are readily applicable to the present case. First, the class primarily benefitted by the tuition grant program consists only of private colleges and their students. Though the appellants characterize the statute as merely equalizing the positions of private and public university students, effectively the chief beneficiaries are the private colleges themselves. Unlike a statute that provides comparable dollar subsidies to all students,²⁵ Alaska's tuition grant program is not neutral, inasmuch as the only incentive it creates is the incentive to enroll in a private college. Subsidy programs suffering from similar deficiencies have been repeatedly struck down under a variety of state constitutional provisions,²⁶ as well as under the Federal Constitution.²⁷

Second, the public funds expended under AS 14.40.776 constitute nothing less than a subsidy of the education received by the student at his or her private college, and thus implicate fully the core concern of the direct benefit provision. While the program may be motivated, as was stated in the preface to the statute as it was originally passed, by the desire to "help retain qualified students in Alaska,"²⁸ such a laudable purpose cannot escape article VII's mandate that Alaska pursue its educational objectives through public educational institutions.

Furthermore, the magnitude of benefits bestowed under the tuition grant program is quite substantial. For the last year in which the tuition grants were paid, 1975-76, Sheldon Jackson received approximately six hundred thousand dollars from the program. The grants were then \$1,850 for each eligible student,²⁹ and for the 1976-77 school year the grants were to be \$2,500.³⁰ According to Sheldon Jackson it has suf-

24. *Wolman v. Walter*, 433 U.S. 229, 250, 97 S.Ct. 2593, 2606, 53 L.Ed.2d 714, 733-34 (1977) (striking down a loan of instructional materials to students after similar loan to schools had been struck down in *Meek*); *Comm. for Publ. Educ. v. Nyquist*, 413 U.S. 756, 785-86, 93 S.Ct. 2955, 2972, 37 L.Ed.2d 948, 970 (1973) (striking down reimbursements to parents for private school tuitions).

25. *Minn. Civ. Lib. U. v. Roemer*, 452 F.Supp. 1316, 1322 (D.Minn.1978) (tax deduction for parents of all school children upheld); *Americans United for the Sep. of Ch. and State v. Blanton*, 433 F.Supp. 97 (M.D.Tenn.), *aff'd mem.*, 434 U.S. 803, 98 S.Ct. 39, 54 L.Ed.2d 65 (1977) (public and private college students eligible for grants); *Durham v. McLeod*, 259 S.C. 409, 192 S.E.2d 202 (1972), *appeal dismissed for lack of a substantial federal question*, 413 U.S. 902, 93 S.Ct. 3060, 37 L.Ed.2d 1020 (1973) (loans to all college students). *But see Miller v. Ayres*, 213 Va. 251, 191 S.E.2d 261 (1972) (conditional grants to public and private college students held unconstitutional); *Weiss v. Bruno*, 82 Wash.2d 199, 509 P.2d 973 (1973) (grants to needy private school children not saved by summer school grants to needy public school children).

26. See *Klinger v. Howlett*, 56 Ill.2d 1, 305 N.E.2d 129 (1973); *Opinion of the Justices*, 357 Mass. 846, 259 N.E.2d 564 (1970); *Opinion of the Justices*, 109 N.H. 578, 258 A.2d 343 (1969).

27. *Comm. for Publ. Educ. v. Nyquist*, 413 U.S. 756, 782 n. 38, 93 S.Ct. 2955, 2970 n. 38, 37 L.Ed.2d 948, 968 n. 38 (1973) (tuition reimbursement to parents of non-public school children); *Sloan v. Lemon*, 413 U.S. 825, 93 S.Ct. 2982, 37 L.Ed.2d 939 (1973) (tuition reimbursement); *Wolman v. Essex*, 342 F.Supp. 399, 412 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808, 93 S.Ct. 61, 34 L.Ed.2d 69 (1972) ("[t]he reimbursement grant aspects . . . are directed only towards the parents of children who attend non-public schools"). See also *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) (auxiliary services only provided to non-public school students); *Publ. Funds for Publ. Schools of N.J. v. Marburger*, 358 F.Supp. 29 (D.N.J.1973), *aff'd mem.*, 417 U.S. 961, 94 S.Ct. 3163, 41 L.Ed.2d 1134 (1974) (private school students reimbursed for textbooks while public schoolers only loaned books); *Members of Jamestown Schl. Comm. v. Schmidt*, 427 F.Supp. 1338, 1348 (D.R.I.1977) (only private school students bused out of district); *Americans United for Sep. of Ch. and State v. Benton*, 413 F.Supp. 955 (D.Iowa 1978) (same).

28. Section 1 ch. 230 SLA 1970.

29. Section 2 ch. 136 SLA 1975.

30. AS 14.40.776(a)(2).

ferred "a substantially diminished capacity" to function as an educational institution as a result of the termination of the tuition grant program, as reflected in a reduction of students, faculty, income and curriculum offerings. Inupiat University claims a similar impairment of function.

Finally, though the tuition grants are nominally paid from the public treasury directly to the student, the student here is merely a conduit for the transmission of state funds to private colleges. Before the state will deliver a check to the student, the latter must certify under oath and under penalty of perjury that he or she will pay it over to the college. AS 14.40.786. Simply interposing an intermediary "does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the Court has held with unvarying regularity that one may not do by indirection what is forbidden directly." *Wolman v. Essex*, 342 F.Supp. 399, 415 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808, 93 S.Ct. 61, 34 L.Ed.2d 69 (1972).

Based on the foregoing we have no difficulty in concluding that the tuition grant program is in its effect a direct benefit to private educational institutions and therefore violates article VII, section 1 of our constitution. Though Sheldon Jackson points out that several courts have upheld tuition grant programs involving college students,³¹ and that aid programs involving colleges have more readily been found constitutional than similar programs involving elementary and secondary schools,³² the cited decisions rely on the *de minimis* degree of church control in the benefitted sectarian colleges. Such reasoning obviously has no

31. *Lendall v. Cook*, 432 F.Supp. 971 (E.D. Ark. 1977); *Americans United for Sep. of Ch. and State v. Bubb*, 379 F.Supp. 872 (D. Kan. 1974) (upheld with respect to most, but not all, church-related schools); *Americans United v. Rogers*, 538 S.W.2d 711 (Mo.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976).

32. *See Roemer v. Bd. of Publ. Works of Md.*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (non-categorical grants to colleges); *Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (state leaseback arrange-

ment with respect to article VII's direct benefit prohibition, which bans aid to all private educational institutions, including those with no religious affiliation.

Sheldon Jackson also argues that the direct benefit clause was not meant to apply to colleges and universities, but only to primary and secondary private educational institutions. We see no basis for this contention. Both the plain language of the constitution and the minutes of the constitutional debate³³ indicate that all private educational institutions were meant to be included. The judgment is **AFFIRMED**.



M-K RIVERS and Alaska Pacific Assurance Co., Appellants,

v.

Robert SCHLEIFMAN, Appellee.

No. 3598.

Supreme Court of Alaska.

Aug. 31, 1979.

Appeal was taken from an order of the Superior Court, Third Judicial District, Victor D. Carlson, J., reversing a decision of the Workmen's Compensation Board and finding that employee was entitled to compensation. The Supreme Court, Connor, J., held that injuries sustained by employee while traveling from a remote work site to

ment with Baptist college); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (construction grants to colleges).

33. The convention delegates were informed by the chairperson of the authoring committee that the committee intended the phrase "other private educational institutions" to include "any educational institution that is not run by the state." 2 Proceedings, *supra* note 3 at 1511. *See also id.* at 1532.

plan for the conservation and rebuilding of the salmon resource.

In adopting Ordinance No. 3 abolishing fish traps the people of Alaska were not unaware that some economic adjustments would be required. The pros and cons of the issue had been considered for many years. All persons engaged in the salmon industry had notice of the obvious trend. The referendum of 1948, the overwhelming adoption of Ordinance No. 3 in 1956 and passage of the Alaska Statehood Act in 1958 clearly indicated the early arrival of the day when the will of the people could be effected. Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation to annihilation of one of the greatest natural food resources known to mankind, to equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity. The judgments below are affirmed.



Howard A. MATTHEWS (substituted for Don M. Dafoe), Commissioner of Education; Alaska Board of Education; Fairbanks School District; Jack Gourley, Transportation Officer for the Fairbanks School District; and Edgar I. Baggen, in his capacity as President of the Board of Directors of the Fairbanks School District, Appellants,

v.

Judy Kay QUINTON, by next of friend, Lawrence R. Quinton and Loyola I. Quinton, on behalf of herself and all other children similarly situated; Lawrence R. Quinton and Loyola I. Quinton, on behalf of themselves and others similarly situated, Appellees.

No. 48.

Supreme Court of Alaska.

April 3, 1961.

Rehearing Denied June 29, 1961.

Class action by nonpublic school pupil to enjoin school authorities from refusing to transport her on a public school bus.

The District Court, [Territory] of Alaska, Fourth Judicial Division, at Fairbanks, Vernon D. Forbes, J., rendered summary judgment for plaintiffs, and the defendants appealed. The Supreme Court, Arend, J., held that the statute authorizing such transportation was not a valid exercise of the police power and violated the constitutional prohibition against direct benefits to nonpublic schools.

Judgment reversed with directions.

Dimond, J., dissented.

1. Schools and School Districts ⇨159½

Within statute providing transportation to children who attend nonpublic schools in certain cases, depending on child's distance from school, crucial distance is not distance to nearest public school or some other nonpublic school, but distance to school child is attending. A.C.L.A. Supp. §§ 37-11-4 to 37-11-6.

2. Schools and School Districts ⇨3

Statute providing for free transportation of children to nonpublic schools violated Organic Act provision prohibiting appropriation of public money for support of nonpublic schools. A.C.L.A. Supp. §§ 37-11-4 to 37-11-6; 48 U.S.C.A. § 77.

3. Constitutional Law ⇨23

A constitutional provision intended to operate retroactively to validate antecedent unconstitutional legislation validates all such legislation, without its re-enactment, unless attempted validation would impair obligation of contract or divest vested rights, but constitutional provision must make some reference, however slight or inferential, to statute intended to be validated.

4. Statutes ⇨55

Constitutional provision continuing in force all territorial laws did not validate territorial statute which violated Organic Act. 48 U.S.C.A. § 21 et seq.; A.C.L.A. Supp. §§ 37-11-4 to 37-11-6.

5. Schools and School Districts ⇨3

Furnishing transportation at public expense to nonpublic school pupils was a direct benefit to school, within constitution-

al prohibition. A.C.L.A. Supp. §§ 37-11-4 to 37-11-6; Const. art. 7, § 1; art. 9, § 6; U.S.C.A. Const. Amends. 1, 14.

6. Schools and School Districts ⇨3

Statute providing for free public transportation of pupils to nonpublic schools was not a valid exercise of police power. A.C. L.A. Supp. §§ 37-11-4 to 37-11-6.

7. Constitutional Law ⇨81

The police power may not be exercised in contravention of plain and unambiguous constitutional inhibitions.

Ralph E. Moody, Atty. Gen., and Norman L. Schwaib, Asst. Atty. Gen., for appellants.

Edward A. Merdes, McNealy, Merdes & Camarot, Fairbanks, for appellees.

Before NEBBETT, C. J., and DIMOND and AREND, JJ.

AREND, Justice.

This is a class action by a school child, Judy Kay Quinton, who, with her parents, sought to enjoin the defendant school authorities from refusing to transport her on a public school bus to the nonpublic school which she was attending. From a summary judgment in favor of Judy and all children of the plaintiff class similarly situated, the defendants have appealed.¹

With some modifications we shall adopt the statement of facts from a written opinion rendered by the lower court at the time of filing the summary judgment.

The amended complaint in this case was filed on February 21, 1959. At that time the plaintiff Judy was eleven years of age and attending the fourth grade in Immacu-

late Conception Elementary School, a non-public school in Fairbanks and within the Fairbanks School District which is an incorporated independent school district. Under the laws of Alaska all children between seven and sixteen years of age, or until they have completed the eighth grade, are required to attend school. Attendance may be at either a public or private school and it is not compulsory if the child resides more than two miles from a school, unless transportation is furnished.² The law also empowers the defendant Alaska Board of Education, among other things, to require school districts to enter into contracts with the Board for the operation, or sub-contracting of the operation, of transportation systems for pupils to and from the schools within their respective service areas.³ Acting for the Board of Education, the Commissioner of Education entered into a contract with the Fairbanks School District for the transportation of pupils residing more than one and one-half miles from the school they were required to attend.

Judy resided more than one and one-half miles from Immaculate Conception School, but there was a public elementary school, with classes up through the sixth grade, less than one and one-half miles from her home. The Fairbanks School District operated a school bus which went by Judy's home and transported children to the public junior and senior high schools in Fairbanks. As this bus went near by Immaculate Conception School, Judy used it for transportation to her school until January 23, 1959, when defendant Jack Gourley, transportation officer for the Fairbanks School District, issued a directive that resulted in this law suit. Under the directive, effective immediately, all public school buses were to

1. This judgment permanently enjoined the defendant Commissioner of Education and the Alaska Board of Education from (1) withholding school bus transportation to the plaintiff class on the basis of their proximity to a public school which they do not attend; (2) applying any other distance test than that of the distance from place of residence to the school of actual attendance for the pur-

pose of determining rights to school bus transportation; and (3) refusing to stop and discharge children attending nonpublic schools at a point along the route nearest to such schools.

2. Section 37-7-1, ACLA 1949.

3. Section 37-2-8, ACLA 1949, as amended, SLA 1957, Ch. 51 (§ 37-2-8, ACLA Cum. Supp. 1957).

discontinue picking up elementary school children living closer than one and one-half miles from a public school and were not to discharge passengers at nonpublic schools en route but were to do such discharging only upon arrival at a public elementary school.

As in the lower court, the controversy here turns upon the effect and constitutionality of an Alaska statute passed by the Territorial legislature in 1955 which relates to the free transportation of children attending nonpublic schools in Alaska. SLA 1955, Ch. 39 (§§ 37-11-4 to 37-6, ACLA Cum.Supp.1957). The statute in question is set out in the margin and will be referred to hereinafter as Chapter 39.⁴ One reading the statute must bear in mind that, at the time of its enactment, Alaska was still a Territory and had for its constitution the Organic Act of Alaska.⁵ Section 9 of this Act prohibited the appropriation of public funds for nonpublic school purposes in the following language:

" * * * nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the government; * * * and

4. Chapter 39, SLA 1055: "Section 1. The Legislature recognizes these facts: "(a) Attendance at schools for all children between the ages of seven and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.

"(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.

"Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted.

"Section 2. In those places in Alaska where transportation is provided under Section 37-2-S ACLA 1949 for children attending public schools, transportation

all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section * * * shall be null and void."⁶

The trial court in its opinion seriously questioned the validity of Chapter 39 in the light of the provision of Section 9 of the Organic Act just quoted, but concluded that such provision yielded to the force and language of the Alaska state constitution subsequently ratified and adopted. We shall have more to say about the pertinent provisions of the constitution further along in this opinion.

[1] The appellants take the position that Chapter 39 does not violate the provisions of the Organic Act if it is given the interpretation to which they claim it is entitled. They argue that Chapter 39, with respect to the transportation of nonpublic school children by public school buses, merely states and means that, if such children live more than a prescribed distance from a public school which they could attend then they are entitled to ride the public school bus to the nonpublic school which they are actually attending, the other requirements of the statute as to "comparable distances" and "same routes" hav-

shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend nonpublic schools which are administered in compliance with Sections 37-11-1, 37-11-2 and 37-11-3 ACLA 1949, where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

"Section 3. This Act shall be administered by the Commissioner of Education under the direction and supervision of the Territorial Board of Education, and the total cost of all such transportation shall be paid from funds appropriated for that purpose by the Legislature."

5. 37 Stat. 512, 49 U.S.C.A. § 21 et seq.

6. 37 Stat. 514, 49 U.S.C.A. § 77.

ing been met.⁷ In other words, the appellants are asking us to construe the words "his school" in Section 1(a) of the statute to mean "a public school." On this issue the lower court ruled that in order for Chapter 39 to make sense, the crucial distance is not the distance to the nearest public school or the distance to some other nonpublic school but the distance which the child must travel in order to reach the nonpublic school which he is attending. With that ruling we are in accord.

Having thus ruled on the construction to be given to Chapter 39, we need to determine next whether it was a valid enactment under the restrictive provisions of Section 9 of the Organic Act. The question of whether statutes providing for the transportation of children to nonpublic schools at public expense are in contravention of a constitutional prohibition against the appropriation of public funds or public school funds for the support or benefit of sectarian or private (nonpublic) schools has been before the courts of the land on a number of occasions. One line of authority holds that such statutes are violative of the constitutional provision mentioned.⁸ The reasoning employed in support of this position is perhaps best stated in the New York case of *Judd v. Board of Education*⁹ wherein the court said:

* * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institu-

tion that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations.' State ex rel. Traub v. Brown * * *. Without pupils there could be no school. 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, accommodations and other facilities are such an aid. * * *"

Then there is another line of authority which holds that a statute such as Chapter 39 is for the benefit of the pupils of the school and that it does not contravene constitutional provisions prohibiting the use of public funds for the benefit of a nonpublic school.¹⁰ The rationale of the two courts which support this latter view is set forth by the District Court of Appeals for the Fourth District of California in *Bowker v. Baker*,¹¹ as follows:

"The general line of reasoning running through those cases which uphold the right of the school district to provide free transportation for [nonpublic] school children finds its starting point in the undoubted police power of the state to promote the public welfare by aiding in practical ways the education of the young. It is generally held that the direct benefit conferred is to the children with only an incidental and immaterial benefit to the private schools; that this indirect benefit is not an appropriation of public money for private purposes and does not violate

7. See note 4 supra.

8. State ex rel. Van Straten v. Milquet, 1923, 180 Wis. 109, 192 N.W. 392; State ex rel. Traub v. Brown, 1934, 6 W.W. Harr. 181, 36 Del. 181, 172 A. 835, writ of error dismissed 1938, 9 W.W.Harr. 187, 39 Del. 187, 197 A. 478; *Judd v. Board of Education*, 1938, 278 N.Y. 200, 15 N.E.2d 576, 118 A.L.R. 789, reargument denied 1938, 278 N.Y. 712, 17 N.E.2d 134; *Gurney v. Ferguson*, 1941, 190 Okl. 254, 122 P.2d 1002; *Sherrard v. Jefferson County Board of Education*, 1942, 294 Ky. 469, 171 S.W.2d 963; *Mitchell v. Consol. School Dist. No. 201*, 1943, 17 Wash.2d 61, 135 P.2d 79, 146

A.L.R. 612; *Visser v. Nooksack Valley School Dist. No. 506*, 1949, 33 Wash.2d 699, 207 P.2d 196; *McVey v. Hawkins*, 1953, 364 Mo. 44, 238 S.W.2d 927.

9. 1938, 278 N.Y. 200, 15 N.E.2d 576, 582, 118 A.L.R. 789.

10. *Board of Education of Baltimore County v. Wheat*, 1938, 174 Md. 314, 199 A. 628; *Adams v. County Commissioners of St. Mary's County*, 1942, 180 Md. 550, 28 A.2d 377; *Bowker v. Baker*, 1946, 73 Cal.App.2d 653, 167 P.2d 256.

11. 1946, 73 Cal.App.2d 653, 167 P.2d 256, 260.

any constitutional provision against giving State aid to denominational schools."

Since the question raised here is one of first impression in Alaska, we have also read and carefully considered the decisions of the courts of Connecticut, Kentucky, Massachusetts and New Jersey, which, at first blush, might seem to follow the Maryland and California rule. We find, however, that those courts did not squarely face the issue before us here.

In *Snyder v. Town of Newtown*, 1960, 147 Conn. 374, 161 A.2d 770, appeal dismissed 81 S.Ct. 692, 5 L.Ed.2d 688, it was held that school funds could be used only for the support of public or common schools. It was also held that a Connecticut statute permitting municipalities to vote whether they should pay from their general funds for the transportation of children to nonpublic schools did not violate a constitutional provision, C.G.S.A.Const. art. 7, § 1, that " * * * no person shall by law be compelled to join or support * * * any congregation, church or religious association."¹²

In *Sherrard v. Jefferson County Board of Education*,¹³ the Kentucky Court of Appeals had held that public school funds could not be used for the transportation of children attending private schools. Three years later, in *Nichols v. Henry*, 1945, 301 Ky. 434, 191 S.W.2d 930, 168 A.L.R. 1385, the same court, though reaffirming its decision in the *Sherrard* case, held that the individual counties could pay for such transportation out of their general funds, but not out of any funds or taxes raised or levied for educational purposes.

The Supreme Judicial Court of Massachusetts in *Quinn v. School Committee of*

Plymouth, 1955, 332 Mass. 410, 125 N.E.2d 410 held that mandamus would lie to compel a town school committee to provide transportation for pupils attending private elementary schools to the same extent that the committee provided transportation for public elementary school pupils. The court avoided the constitutional question by holding that, since no personal or property rights of the committee were involved, that body could not question the constitutionality of the statute which provided for such transportation.

The New Jersey Court of Errors and Appeals, in *Everson v. Board of Education of Ewing Tp.*,¹⁴ on the rule of presumption sustained the constitutionality of state legislation which authorized the local school districts to make rules and contracts for the transportation of children to and from school and also held valid the resolution under which the appellee, a township board of education, authorized reimbursement to parents of money expended by them for transportation of their children to Catholic parochial schools. Since it was not shown, one way or the other, that any of the funds involved came from [133 N.J.L. 350, 44 A.2d 336] "the fund for the support of free schools" the court presumed that the payment was made out of money constitutionally available for that purpose. It is obvious that the court would have decided otherwise if any showing had been made that the funds had been mingled as argued by the dissenting opinion.¹⁵ Be that as it may, New Jersey amended its constitution two years later to permit such transportation.¹⁶

The *Everson* case eventually reached the Supreme Court of the United States,¹⁷ which by an unpersuasive five to four deci-

portation. The latter case is reported as *Everson v. Board of Education of Ewing Tp.*, 1944, 132 N.J.L. 93, 39 A.2d 75.

15. 44 A.2d at pages 340-341.

16. See note 45 *infra*.

17. *Everson v. Board of Education*, 1947, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392.

12. 161 A.2d at page 775 note 2.

13. 1942, 294 Ky. 460, 171 S.W.2d 963.

14. 1945, 133 N.J.L. 350, 44 A.2d 333, reversing a judgment of the New Jersey Supreme Court in favor of the taxpayer, *Everson*, who had challenged the right of the Board to reimburse parents of parochial school children for bus fares paid in connection with school trans-

sion upheld the New Jersey statute mentioned above. The majority of the Court accepted the finding of the New Jersey Court of Errors and Appeals as being "that neither the [New Jersey] statute nor the resolution [of the school board] passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue."¹⁸ Actually, as we view it, the New Jersey court held that only general state funds and general funds of the school districts could be constitutionally used to pay the costs of transportation to nonpublic schools. But "the fund for the support of free schools" could not be so used. Historically such special school funds were set aside and used entirely for the support of the free schools. The early state constitutions were worded with the thought in mind that the only money available to the schools would come from that fund and would be limited to the support of public free schools. The income from such funds has been found inadequate to supply the money needed for schools in this modern age however, and so recourse is also had to the general funds.¹⁹ The New Jersey court concluded that the state constitution did not prohibit the use of "general funds" to pay for transportation to nonpublic schools. The Alaska Organic Act made no such distinction between "general funds" and "funds for the support of free schools." Its proscription was against the appropriation of "any public money."²⁰

In the final analysis, the Supreme Court in the *Everson* case did nothing more than accept the state court's interpretation of

the New Jersey constitution and then hold that the use of the state's general fund to pay for the transportation in question was not a violation of the First and Fourteenth Amendments of the federal constitution.²¹

[2] Having carefully examined Chapter 39 and that provision of Section 9 of the Alaska Organic Act which proscribed the appropriation of public funds for the support or benefit of any sectarian, denominational or private school, and having weighed the decisions from other jurisdictions for and against the right of a state to provide for the free transportation of children to nonpublic schools, and being mindful of the due regard which should be had for a judicial determination of the United States Supreme Court on a related matter, we hold that Chapter 39 violated the plain provisions of the Organic Act above mentioned.

In its public schools Alaska has long provided for the secular education of all children, but it does not prevent any child from obtaining secular or both secular and sectarian education in nonpublic schools, provided only that these schools meet the secular standards prescribed.²² If those standards are met, the parent or guardian has a constitutional right to send the child to a nonpublic school.²³ The exercise of this right by the individual is not inconsistent with our determination that the legislature of the Territory of Alaska under the provisions of Section 9 of the Organic Act had no authority to pass a statute which required the use of public

18. 11., 330 U.S. at page 4, 67 S.Ct. at page 505, 91 L.Ed. at page 717, 163 A.L.R. at page 1393.

19. *Everson v. Board of Education of Ewing Tp.*, 1945, 133 N.J.L. 350, 44 A.2d 333, 336; see also *Visser v. Nooksack Valley School Dist. No. 506*, 1949, 33 Wash.2d 699, 207 P.2d 195, 202.

20. The same holds true under the provisions of article VII, section 1, and article IX, section 6 of the Alaska state constitution.

21. The majority opinion was written by Justice Black, with Chief Justice Vinson and Justices Murphy, Reed and Douglas concurring. Justices Jackson, Rutledge, Frankfurter and Burton dissented.

22. These standards are set forth in sections 37-11-1 to 37-11-3, *ACLA* 1949 and pertain to teachers' certificates, final eighth grade examinations and diplomas, and attendance and annual reports.

23. *Pierce v. Society of Sisters*, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 465.

funds to pay for the transportation of children to a nonpublic school; because such use of the public funds, we hold, constitutes a benefit to the nonpublic school. Nor is such legislation a valid exercise of the police power, as we shall later point out.

At this point the appellees, Judy Quinton and her parents, interpose the argument that, even if Chapter 39 violated the provisions of the Organic Act here under consideration, no court ever passed upon the question of its constitutionality during Alaska's territorial status. Hence, the statute was in full force and effect when the Alaska state constitution became operative on January 3, 1959,²⁴ and was ratified and confirmed by article XV, section 1 of the constitution which provides:

"All laws in force in the Territory of Alaska on the effective date of this constitution and consistent therewith shall continue in full force until they expire by their own limitation, are amended, or repealed."²⁵

We cannot accept the argument as a sound one. The dictionary²⁶ gives the word "valid" as one of the definitions of the phrase "in force." Professor Willoughby in his work on constitutional law stated some thirty years ago that the validity of a statute is to be tested by the constitutional powers of a legislature at the time of its enactment and, if so tested, it is beyond the legislative power, it will not be rendered valid by a constitutional amendment, except by subsequent re-enactment.²⁷

We consider the finding of the Washington State supreme court on a similar question in *State v. Ellis*, 1900, 22 Wash.

129, 60 P. 136, to be applicable here. In 1854 the legislature of the Territory of Washington passed a law providing that a defendant in a criminal case and the prosecuting attorney, with the assent of the court, might submit the trial to the court except in capital cases. Ellis was charged with robbery and stipulated that he should be tried by eleven jurors. The jury found him guilty and Ellis moved to set aside the verdict as void and for a new trial. The lower court granted the motion for the reason that Ellis could not waive the constitutional right to a trial by twelve jurors. The state appealed from the motion, contending that inasmuch as the law was upon the statute books at the time of the adoption of the Washington state constitution (1889), and section 2 of article 27 of the constitution provided that the laws which were then in force in the Territory of Washington and not repugnant to the constitution should remain in full force until they expired by their own limitation or were repealed by the legislature, this law became incorporated into the laws of the state and had to be considered as valid existing constitutional law until declared to be unconstitutional by competent judicial authority. To this claim of the state, the appellate court replied:

"But we hardly think this rule of construction is sound. Section 2 of article 27 could not be construed as re-enacting a statute, as all the force it had was to continue in force all valid laws which were then in existence."²⁸

[3, 4] We recognize the legal principle that a constitutional provision, which from the language used shows expressly or by

24. The present action was not commenced until January 30, 1959, twenty-seven days after the effective date of the state constitution.

25. This argument may have stemmed from the opinion of the lower court in which it was stated that "the efficacy of this clause of the Organic Act obviously yielded to the force and language of the Alaska Constitution from and after Jan-

uary 3, 1959, in particular Article VII, Section 1 thereof."

26. Webster, *New International Dictionary*, Unabridged (2d ed. 1960).

27. 1 Willoughby, *Constitutional Law of the United States* § 7, at 11 (2d ed. 1929).

28. 60 P. at page 137.

necessary implication that it was intended to operate retrospectively to validate antecedent unconstitutional legislation, renders valid all such legislation to which the constitutional provision relates, without re-enactment by the legislature, unless such attempted validation would impair the obligations of a contract or divest vested rights.²⁹ The cases we have examined, bearing on the subject, require that the validating constitutional provision must make some reference, however slight or inferential, to the statute intended to be validated.³⁰ Tested by the principles just stated, section 1 of article XV of the Alaska constitution, in our opinion, does not show by the language used, either directly or by necessary implication, that it was intended to operate retrospectively so as to validate Chapter 39. It follows, therefore, that Chapter 39 remains as void today as it was on the day of its enactment.

We next address ourselves to the question of whether under section 1 of article VII and section 6 of article IX of the state constitution, Chapter 39 may now be validated through its re-enactment by the state legislature. We believe not.

Section 6 of article IX of our constitution specifically declares that

"No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."

This is a general measure and expresses a very definite policy. It needs to be considered, however, in relation to section 1 of article VII which provides that

"The legislature shall by general law establish and maintain a system of public schools open to all children of the State and may provide for oth-

er public educational institutions. Schools * * * so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."

Appellees concede that there is conflict in the judicial philosophies relative to statutes of such kind as Chapter 39 but maintain that the view favoring their constitutionality is the more persuasive, reflects the current judicial trend and is called for by the decision of the United States Supreme Court in the *Everson* case. We disagree except as to the statement that there is a conflict in the judicial philosophies.

The key words in section 6 of article IX and section 1 of article VII of the Alaska constitution, insofar as this case is concerned, are "for a public purpose" and "direct benefit." Appellees contend that Chapter 39 serves a very valuable public purpose by encouraging compliance with the state's compulsory education law and contributes to the health and welfare by eliminating the hazards of highway and climatic conditions in Alaska for nonpublic school children. It is their further contention that Chapter 39 is designed to aid the parents and their children. In this connection they cite the cases from other jurisdictions which hold that the transportation of school children to nonpublic schools is for the benefit of the children and confers no direct benefit upon the schools concerned.

It is true that the legislature in enacting Chapter 39 recognized the following facts as stated in the statute itself:

"(a) Attendance at schools for all children between the ages of seven

29. Annotation, 1947, 171 A.L.R. 1072-1079, in which the rule is stated and many cases in relation thereto are cited and discussed.

30. *People ex rel. McClelland v. Roberts*, 1896, 148 N.Y. 360, 42 N.E. 1052, 31 L.R.A. 399; *Fontenot v. Young*, 1911, 128 La. 20, 54 So. 403; *Peck v. Tug-*

well, 1941, 199 La. 125, 5 So.2d 524; *Lee v. Superior Court*, 1923, 191 Cal. 46, 214 P. 972; *Boyd v. Olcott*, 1921, 102 Or. 327, 202 P. 431, 443; *Northern Wasco County People's Utility District v. Wasco County*, 1950, 210 Or. 1, 305 P. 2d 766, 771; *Porto Rico Brokerage Co. v. United States*, 1934, 71 F.2d 469, 23 CCPA 238.

and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.

"(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.

"Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted."

But this intent of the legislature to protect the health and safety of all school children in Alaska was not carried out in the statute enacted. The only nonpublic school children entitled to free transportation under Chapter 39 are those who must travel comparable distances and the same routes over which the children attending public schools are transported. In other words, nonpublic school children who are fortunate enough to be living along a public school bus route are given transportation. All other nonpublic school children living within the two mile compulsory attendance limit and more than one and one-half miles from their school are left to fend for themselves.

It cannot be truthfully said that the severe winter weather and the highways without sidewalks around Fairbanks are less hazardous to the health, welfare and safety of the nonpublic school child who does not live along a school bus route and therefore has to walk to school than to

the health, welfare and safety of his classmate who rides because his home is along the route. Nor can anyone say that the public school first grader, who lives 1.49 miles from his school and has to walk, will feel the cold less than, and not have to face the same traffic risks as, an older sixth grader of the nonpublic school who gets to ride on the public school bus because he lives along the bus route and at a distance of 1.51 miles from the nonpublic school of his choice.

Neither the inclement weather nor highway traffic hazards were used as a justification for the first law passed in Alaska to provide transportation for school children. We refer to section 83 of chapter 97 of the Laws of Alaska, 1929, which simply stated that school boards were authorized to contract for the transportation of pupils "who reside a distance of more than two (2) miles from the school they are required to attend, or where such transportation is necessary to afford children an opportunity to attend school." Distance from school seems to have been the motivating force for legislation at that time.

By what has just been said we do not mean to imply that the legislature has no authority to provide by legislation for the health and safety of all school children in Alaska. Nor do we mean to decide that Chapter 39 is discriminatory in its nature. All we are saying at this time is that Chapter 39 does not effectuate the intent expressed therein by the legislature.

[5] Turning now to the argument that the transportation of school children to nonpublic schools on public school buses is of direct benefit only to the child,³¹ we

31. The "child benefit theory" seems to have been first advanced in support of a Louisiana statute providing for the appropriation of public funds for the purchase of school books for nonpublic school children. In *Borden v. Louisiana State Board of Education*, 1929, 163 La. 1005, 123 So. 655, 663, 67 A.L.R. 1183, the Louisiana supreme court held that such appropriation was for the benefit

of the children and the resulting benefit of the state. Three of seven members of the court took the view that the statute was unconstitutional, stating that "the maintenance of private or sectarian schools, however valuable may be the work which they perform, is not a public purpose so as to justify the expenditure of the public money in their support."

say again that, in our opinion, the furnishing of such transportation at public expense constitutes a direct benefit to the school. This was the view expressed by the courts of Delaware, New York, Oklahoma, Washington, and Kentucky,³² and it was also the view favored by the dissenting jurists in Maryland,³³ Louisiana (in a textbook case),³⁴ and New Jersey,³⁵ where the state courts have adopted the child benefit theory, and by the four dissenting Justices of the United States Supreme Court in *Everson v. Board of Education*.³⁶ Said Mr. Justice Putledge in the *Everson* case:

"Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See *Judd v. Board of Education*, 278 N.Y. 200, 212, 15 N.E.2d 576, 118 A.L.R. 789. But the proverbial Mark Hopkins conception no longer suits the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be main-

tained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without.

"For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure. * * *"³⁷

32. The cases in which the states listed in the text rejected the child benefit theory are cited in note 8 supra.

33. *Board of Education of Baltimore County v. Wheat*, 1938, 174 Md. 314, 199 A. 628, 633-642.

34. *Borden v. Louisiana State Board of Education*, 1928, 168 La. 1005, 123 So. 655, 662-664, 67 A.L.R. 1183.

35. *Everson v. Board of Education of*

Ewing Tp., 1945, 133 N.J.L. 350, 44 A.2d 333, 338-343.

36. *Everson v. Board of Education*, 1947, 330 U.S. 1, 47-49, 67 S.Ct. 504, 527, 91 L.Ed. 711, 740.

37. Judge Case of the New Jersey Court of Errors and Appeals, who wrote the dissenting opinion in the *Everson* case when it was being considered in the state court, pointed out that among the weak-

About two years after the United States Supreme Court had handed down its opinion in the *Everson* case,³⁸ the supreme court of the state of Washington decided in *Visser v. Nooksack Valley School District No. 306*,³⁹ that the payment of transportation to parochial schools violated the state constitution. The court did not feel itself bound by the decision in the *Everson* case and in that respect stated:

"Our own state constitution provides that no public money or property shall be used in support of institutions wherein the tenets of a particular religion are taught. 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

nesses in the "child benefit" argument, as a means of avoiding constitutional limitations, "are its vagueness and the impossibility of satisfactorily distinguishing one item of expenses from another in the long process of child education." [133 N.J.L. 350, 44 A.2d 339] He continued:

"We quickly perceive that it [the "child benefit" argument] applies not merely to transportation costs but to the potential costs of the many and varied items entering into modern education. There is no logical stopping point. Related items, already in the public school system, in addition to the vast field having to do with the actual imparting of knowledge, are the installation and maintenance of cafeterias, the preservation and promotion of the health of pupils, the employment of medical inspectors and nurses, the keeping of records of development and

consideration by reason of the decision in the *Everson* case, supra, 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."

The most recent appellate court case, which we have found, that strikes down transportation of nonpublic school children on public school buses is that of *McVey v. Hawkins*, 1953, 364 Mo. 44, 258 S.W. 2d 927. Here the Missouri supreme court, sitting en banc, delivered a per curiam opinion that transportation of parochial school pupils on public school buses was an expenditure of public school funds for other purposes than the support and maintenance of free public schools as directed by the constitutional and statutory provisions of the state, notwithstanding the claim that the buses furnishing such transportation did not travel any greater distance or by any different route or make any special stops and that, consequently, no additional expense or outlay of any kind was incurred by the furnishing of such transportation. Without mentioning the *Everson* case, the court expressly rejected the "child-benefit theory."

In spite of appellants' contention that the *Everson* case is controlling in the case

growth, and the supervision of athletic activities and bodily exercise. I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools toward 'the advancement of education, the promotion of literacy and the health and safety' of the pupils. Every step in the educational process is, presumably, for the benefit of the child and, therefore, theoretically for the benefit of the state. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools."

38. Page 936, supra.

39. 1949, 33 Wash.2d 699, 207 P.2d 199, 204.

at bar and contrary to the opinion of the District Court for the District of Alaska that it felt itself bound by the holding in the Everson case,⁴⁰ we propose to follow the reasoning of the Courts of Washington, Missouri, Delaware, Wisconsin and Oklahoma and hold that transportation of school children to nonpublic schools at public expense would be in contravention of our state constitution.

There remains for consideration the claim of the appellees that the minutes of the Alaska constitutional convention make it unmistakably clear that, in refusing to add the term "indirect" as an amendment to article VII, section 1, of the constitution, the delegates explicitly intended to continue and not to eliminate bus transportation for nonpublic school children. The minutes of the convention⁴¹ do reveal that the Committee on Health, Education and Welfare Provisions in drafting the last sentence of article VII, section 1, which provides that "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution," considered the words "direct" and "indirect" and felt that the

words "or indirect" after the word "direct" should not be used for the reason that "they would reach out to infinity practically" and shut out the children in private schools from such free care as was being given by the state welfare department to all children.⁴²

Several delegates to the constitutional convention in the floor debate on the issue of whether section 1 of article VII should be amended to include the words "or indirect," mentioned transportation but only one of them, Mr. Buckalew, expressed an opinion in the matter, stating

"Mr. President, I don't think the question has been answered yet by any of the persons who have spoken on this subject. If the word 'indirect' is in there, it is going to eliminate almost any kind of aid. It will, for example, eliminate the free lunch, eliminate bus transportation, eliminate for example, if we had a school or an institution where they had a school, it would eliminate the State giving any support to the child because that would be indirect support to the institution. I think when the members

40. The Honorable Vernon D. Forbes who wrote the opinion below, upon which the judgment was based, frankly admitted that if he had not felt himself bound by the holding in the Everson case, he would have adopted the reasoning and decision of the dissenting Justices and ruled otherwise. It was his feeling that the wall of separation between church and state in this country had been weakened by Everson.

41. All references in this opinion to the minutes and proceedings of the Alaska constitutional convention are to the Records of Alaska Constitutional Convention, now in the custody of the Secretary of State, Juneau, Alaska.

42. Roland Armstrong, a member of the Committee on Health, Education and Welfare Provisions, spoke for the Committee and explained to the convention the reasons for the Committee's action in using the word "direct" as follows:
" * * * This section gives the education or other departments the right to seek out the children, independent of their religious affiliations, to help them

to become a strong and useful part of society wherever it touches health and matters of welfare. We would also point out in the light of letters that have come to this floor relative to the disbursement of funds, denominational or other private institutions, this does not prohibit the use of funds in other educational matters, and I am sure that no one on the committee would object to the inclusion of this word as we have given the amendment here to clarify this one statement. Now it reads as has been amended by the Committee, 'No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.' We did this to take any doubt away on the part of this Convention of our motives, and we state that where there are welfare cases for children in homes and when there are indigents in hospitals that we do not wish to interfere with that practice of helping to serve people through those institutions * * *." Alaska Constitutional Convention Minutes, January 9, 1956, pp. 55-56.

vote on it, I think they ought to understand the word "indirect" cuts out everything, just eliminates all kinds of support."⁴³

From such a state of the record the appellees would have us infer that the minutes of the constitutional convention make it unmistakably clear that the delegates intended not to eliminate free transportation for nonpublic school children. We find no such clear meaning expressed in those minutes as would give us any reliable assistance in interpretation. As Professor Willoughby once observed, "Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause."⁴⁴ We feel that the delegates to the Alaska constitutional convention and the people who by their vote ratified the constitution left it to this court to decide whether free transportation of children to nonpublic schools would constitute a "direct" benefit to the schools. If they had intended otherwise, we are certain that the framers of our constitution would have followed the example set by the people of New York and New Jersey and settled the controversial issue by providing in the constitution itself for transportation of school children to nonpublic schools at state expense.⁴⁵

[6,7] Earlier in this opinion we stated that we did not consider Chapter 39 a valid exercise of the police power of the

state.⁴⁶ That point needs to be clarified. It has been said that the police power—broad and comprehensive though it is—may not be exercised in contravention of plain and unambiguous constitutional inhibitions.⁴⁷ In *Board of Education of Baltimore County v. Wheat*,⁴⁸ Judge Parke, dissenting, conceded that the sovereign state has inherent and reserved police power to enact laws to promote the safety, health and general welfare of society but stated that this power must be exercised within constitutional limits. It was his opinion, and that of the other two judges who concurred in the dissent, that the extension of the exercise of the police power to the transportation of school children, because of the dangers of pedestrian travel by children upon the public highway, would be of doubtful legality even if it were an effort of the state to protect, without discrimination, all school children.

The summary judgment is reversed with directions to dismiss the action.

RESBETT, C. J., concurs.

DIMOND, Justice (dissenting).

I dissent from the majority's harsh and unjust conclusion. In reviving the lifeless corpse of the Alaska Organic Act, the court ignores realities and establishes a harmful rule of constitutional interpretation. In concluding that the transportation of a child directly benefits a school, it disregards facts inescapable on the record of the Constitutional Convention, and assumes a state of facts that the record does

43. *Id.* at 69.

44. 1 Willoughby, *Constitutional Law of the United States* § 32 (2d ed. 1929).

45. New York amended article 11, section 4, of its constitution in 1938, after the decision in the Judd case (see note 8 and page 935, *supra*), to permit the legislature to provide for the expenditure of public funds for the transportation of children to and from any school. *Board of Education of Central School District No. 1, etc., v. Allen*, 1959, 17 Misc.2d 1080, 192 N.Y.S.2d 186. New Jersey, on the other hand, adopted an entirely new

constitution in 1947 and provided as a part of article VIII, section 4, paragraph 3, thereof that "The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five (5) and eighteen (18) years inclusive, to and from any school."

46. Pages 937 and 938, *supra*.

47. *Mitchell v. Consolidated School Dist. No. 201*, 1943, 17 Wash.2d 61, 135 P.2d 79, 146 A.L.R. 612, citing authorities.

48. 1933, 174 Md. 314, 199 A. 628, 633

not support. In expressing criticism of the school bus statute because literally "all" school children in Alaska are not afforded transportation, it unjustifiably imputes to the legislature fictitious motives, and usurps the legislative prerogative of determining what is appropriate or necessary for the public good. In pointing out that weather and traffic hazards are as detrimental to the non-public school children who are not entitled to transportation under Chapter 39 as to those who do qualify for the assistance given by the statute, it suggests the existence of an unfair discrimination; and then in ultimately denying bus transportation to all non-public school children, it compounds the very discrimination which it appears to deplore. In construing the constitution so narrowly and constrictively, it saps the strength and takes the meaning from the classic statement of human rights in the first article, that "This constitution is dedicated to the principles * * * that all persons are equal and entitled to equal rights, opportunities, and protection under the law * * *." In permitting a child to ride a school bus only on the condition that he attends a public school, it has the coercive effect of restricting the natural right of parents, acting in accordance with their legitimate preferences, to direct the education of their children; and thus it disregards the fundamental theory of liberty which excludes any general power in the government to standardize the education of children.

1. *The Alaska Organic Act.*

The Organic Act prohibited the appropriation of public money for the "support

or benefit" of a private school.¹ The state constitution prohibits the payment of money from public funds for the "direct benefit" of any such school.² I am convinced that Chapter 39 confers no benefit of any kind on the private school, and therefore is a valid legislative enactment whether tested under the Organic Act or the constitution. But I submit that the court has established a harmful rule of construction in measuring the validity of an existing statute against an organic law which no longer existed after Alaska became a state.³

It is an established doctrine of American jurisprudence that a legislative enactment is presumed to be valid and constitutional,⁴ and that the final authority in determining whether this is so is vested in the judiciary.⁵ If this doctrine has any significance at all it means that a statute, until declared invalid by a court, is an operative fact. The act involved here was so considered. Since its enactment in 1955, and at the time the state constitution became effective, it was in operation; it was respected and obeyed by those charged with the duty of executing the laws. It is in effect now. This is as it ought to be.⁶

If at the time the constitution became operative the presumption of validity still attached to Chapter 39, and it was recognized by all concerned as something that existed and had meaning, rather than as a nullity or something that did not exist, then I submit that it was a law "in force" within the meaning of article XV, section 1. So long as it was consistent with the constitution it was intended to continue in force until it expired by its own limitations,

1. 37 Stat. 514 (1912), 48 U.S.C.A. § 77 (1952).

2. Alaska Const. art. VII, § 1.

3. Alaska became a state on January 3, 1959. Exec. Proclamation No. 3239. 24 Fed. Reg. 81 (1959), 48 U.S.C.A. note preceding section 21, Alaska Statehood Act, 72 Stat. 339 (1958), 48 U.S.C.A. preceding section 21. At that moment the State Constitution became effective and superseded the Alaska Organic Act.

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4. 1 Willoughby, Constitutional Law, § 23 at 42-43, and § 27 at 47 (2d ed. 1929).

5. *Marbury v. Madison*, 1803, 1 Crauch 137, 177-178, 5 U.S. 137, 177-178, 2 L.Ed. 60, 73; *Pollock v. Farmers' Loan & Trust Co.*, 1895, 157 U.S. 429, 554, 15 S.Ct. 673, 39 L.Ed. 759, 910; 16 C.J.S. Constitutional Law § 92.

6. See *Wall v. Close*, 1942, 201 La. 986, 10 So.2d 770, 783.

or was amended or repealed. The only restriction or limitation was that such a law be in harmony with the constitution; it was not required that it also be consistent with the Territorial Organic Act. Logically, then, this means that the validity or constitutionality of such a statute was thereafter to be tested only against the limitations set forth in the new state constitution.

The delegates to the Convention were not framing an organic law for people entering into political society for the first time, but rather for a community already organized with existing laws. It can be presumed that they knew the nature and effect of those laws. They felt it unnecessary and impracticable to provide for the enactment of an entire new body of law for the state when existing statutes would in most instances suffice. Consequently, they did what was only reasonable and practical; they provided for the continuation of Territorial laws where they were in harmony with the constitution. They thus established for the state a system of statutory law with the same legal effect as if those statutes had been re-enacted by the legislature for the state⁷—that branch of the state government which derives all of its authority from the constitution.

The statutes thus adopted by reference were those that were "in force" on the effective date of the constitution. The majority says that the dictionary gives the word "valid" as one of the definitions of the phrase "in force". But the dictionary also states that the phrase means "operative."⁸ It is more reasonable to assume that this is what was intended. The delegates could not determine which laws were

valid and which were not. If Territorial laws existed and had not been declared invalid by a court, then they were operative—they were in force. It would be presumed that they were also valid.

The construction adopted by the majority of this court can be explained only on the theory that if an act of the legislature was invalid under the Organic Act it was not a law; it was inoperative, conferred no rights, imposed no duties and afforded no basis for actions taken under it.⁹ If such a broad statement is universally true, it would logically follow that something that was not a law at the time of enactment could not be a law in force at the time the constitution became effective.¹⁰

But it has been found that this statement must be taken with qualifications. Professor Willoughby recognized this some thirty years ago. He spoke of "circumstances under which legal rights or obligations or consequences are attached to a legislative enactment which is later held to be unconstitutional", and stated that "the retroactive force of the judicial pronouncement as to unconstitutionality is not complete."¹¹ The courts, too, have seen the problem. The Court of Appeals for the Third Circuit, in speaking of a taxing statute, said:

"Accepting the unconstitutionality of the act of 1929, as determined by the Supreme Court of the State, it was none the less a statute under which the school district acted when it levied its taxes for the years 1937 and 1938."¹²

The Court of Appeals for the District of Columbia, after referring to the belief that

7. See *People ex rel. McClelland v. Roberts*, 1895, 13 Misc. 448, 34 N.Y.S. 641, 650, affirmed in 1896, 148 N.Y. 360, 42 N.E. 1082, 1085, 31 L.R.A. 399.

8. Webster, *New International Dictionary*, Unabridged, at 986 (2d ed. 1960).

9. *Norton v. Shelby County*, 1886, 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L.Ed. 178, 186; *Chicago I. & L. R. Co. v. Hackett*, 1913, 228 U.S. 559, 566, 33 S.Ct. 581, 57 L.Ed. 966, 969.

10. *Ex parte Bustillos*, 1920, 26 N.M. 449, 194 P. 886, 889.

11. 1 Willoughby, *Constitutional Law*, § 3 at 11 (2d ed. 1959).

12. *Phipps v. School District of Pittsburgh*, 3 Cir., 1940, 111 F.2d 393, 395. And see also *J. A. Dougherty's Sons, Inc. v. Commissioner of Internal Revenue*, 3 Cir., 1941, 121 F.2d 700, 702.

if an act is declared unconstitutional it never had any force or effect, said:

" * * * Yet a realistic approach is eroding this doctrine. * * * " 13

The principle, and the problem, has perhaps been most explicitly stated by Mr. Chief Justice Hughes when, in speaking for a unanimous court, he said:

"It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. * * * " 14

There are, indeed, difficult questions, as the Chief Justice stated. Adherence to the rule of absolute retroactive invalidity might well have undesired consequences in this case. It could mean that if Chapter 39 were not really a law when it was enacted in 1955, every action taken under it was

invalid, unlawful and without meaning. Monies used to transport children who did not attend the public school were illegal expenditures. In fairness to Alaska taxpayers, those monies should now be recovered by the state.

But this raises various problems. From whom, for example, would the state seek recovery of those expenditures? Would it be the Commissioner of Education whose duty it was under Chapter 39 to administer the statute? Would it be the school bus contractor to whom the monies have been, and are now, being paid? Or would it be, perhaps, the child who rode the school bus, at public expense, in violation of the Organic Act and the constitution?

I would doubt that the executive branch of our government, which has so successfully assailed the validity of the statute, would choose to go that far. But if it did not, then it places itself in the inconsistent position of saying on one hand that the act was a nullity, of no force and effect whatever, and on the other hand in saying that it really did have some operative force prior to the effective date of this court's judgment declaring the statute invalid. If it is considered that the past may not be disturbed because, e. g., rights have become vested or because prior determinations deemed to have finality have been made or perhaps even because of considerations of broad public policy, then in all fairness there should be recognized the operative force of Chapter 39 at the time the constitution became effective and the fact that it was a law "in force" within the meaning of article XV, section 1.

Another striking incongruity is found in the court's holding that it is not bound by the decision of the United States Supreme Court in the *Everson* case.¹⁵ If Chapter 39 was void on the day of its enactment, as the majority says it was, then to be con-

13. *Warring v. Colpoys*, 1941, 74 App.D.C. 303, 122 F.2d 642, 646, 136 A.L.R. 1025.

14. *Chicot County Drainage District v. Baxter State Bank*, 1940, 305 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329, 332-333. See also *National Labor Re-*

lations Board v. Rockaway News Supply Co., Inc., 1953, 345 U.S. 71, 77, 73 S.Ct. 519, 97 L.Ed. 832, 837.

15. *Everson v. Board of Education*, 1947, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711.

sistent the court should recognize the status, as it then existed, of the judicial system which had the power to determine whether the act was void under limitations found in the Organic Act.

In 1955 Alaska was a Territory. Its judiciary consisted of one district court, created by act of Congress.¹⁶ That court was bound to follow the law as laid down by the United States Supreme Court; it was not free to disregard a pertinent decision of the Supreme Court if it felt, as the majority does here, that such decision was unpersuasive.¹⁷

In *Everson* it was held that use of New Jersey's general fund to pay for transportation of children to parochial schools was not a violation of the first and fourteenth amendment to the federal constitution. The court found that those monies were used for a public rather than a private purpose, and that they did not have the effect of supporting the parochial schools. It is manifest, also, from what the court said that no benefit was considered to have been conferred upon such schools, and that if it had, the decision on the constitutional questions would have been the other way.

That decision, then, would have been controlling if the validity of Chapter 39 had been determined by the Territorial District Court. That court, regardless of the personal views of a particular judge, would have been required to hold that the use of public monies to provide transportation of children to non-public schools neither supported nor benefited such schools. Chapter 39 would, of necessity, have been declared to be a valid act of the Alaska Legislature and not contrary to the Territorial Organic Act.

This demonstrates the incompatible positions that this court has taken. In order to justify its assumed right to test the validity of Chapter 39 against the now non-

existent Organic Act, it says that one must go back in time and ascertain whether the act would have stood up under limitations found in the organic law of the Territory of Alaska. But it chooses to ignore a logical condition of utilizing such approach—that of also measuring the validity of Chapter 39 against restrictions on judicial pronouncements then imposed upon the Territorial District Court. This court reaches into the past to resurrect the Organic Act; it then returns to the present to assume the prerogative of a state court, not bound in a matter like this to follow a pertinent decision of the United States Supreme Court.

If the court insists on applying the rule as to absolute retroactive invalidity, then I submit it should be applied in its entirety. If this is done, it would be readily apparent that Chapter 39 was a "law in force", within the meaning of the constitution, and that the Alaska Organic Act has no bearing at all on the issue in this case.

2. *Constitutional History.*

If all relevant proceedings of the Constitutional Convention are considered, it will be abundantly clear that the "direct benefit" proscription in article VII, section 1, was not meant to preclude public transportation of children attending non-public schools. This court, however, refuses to attach importance to any of such proceedings. It takes the position that it was left to the court to decide whether free transportation of children to non-public schools would constitute a direct benefit to the schools, and that if the delegates to the Convention had intended otherwise they would have made specific provision in the constitution for such transportation. In short, the majority sets no value on constitutional history in determining constitutional intent.

That, I think, is unsound. The words "direct benefit" require definition; if they

16. 31 Stat. 322 (1900), 48 U.S.C.A. § 101.

17. *Lindeberg v. Howard*, 9 Cir., 1906, 140 F. 467, 472, 2 Alaska Fed. 597, 604; *Kroeger v. Twin Buttes R. Co.*, 1911, 13 Ariz. 348, 114 P. 553, 554; *Hawaiian*

Tuna Packers v. International L. & W. Union, D.C.D.Haw.1947, 72 F.Supp. 502, 565. See also *Missouri, K. & T. Ry. Co. v. Walker*, 1911, 27 Okl. 849, 113 P. 907, 908.

did not, this case would not be before the court. In such a case it is entirely proper and perhaps even necessary to have recourse to extrinsic evidence in order to ascertain the meaning which those words had at the time the constitution was written and adopted.¹⁸ An important source of such evidence would be found in the history of events which led up to the adoption of the section where the words were used, and this history would include the recorded proceedings of the Constitutional Convention.¹⁹ As the United States Supreme Court said with respect to the Federal Constitution:

"The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning. * * *"²⁰

The court points out that motions and debates do not necessarily indicate the purpose of the majority of a convention in adopting a particular clause. But the point that I make is that if there are other convention proceedings, in addition to motions and debates, which clearly show the purpose of the provision in question, that this furnishes a valuable and satisfactory aid to interpretation which should not be ignored.

At the Convention in November 1955 delegates Johnson and Coghill introduced Delegate Proposal No. 6 which dealt with the subject of education. Section 7 provided in part:

"No public funds * * * shall be used directly or indirectly for the sup-

port, operation or maintenance, including transportation and other auxiliary services, for any schools or children therein except those Public Schools under the exclusive supervision and direction of the State."²¹ (Emphasis added.)

On December 15, 1955 the Committee on Preamble and Bill of Rights submitted a report to the Convention and transmitted an article on health, education and welfare. This report stated that Delegate Proposal No. 6 had been considered and that "the Committee adopted sections 3 and 7 with some changes."²² Section 7 of that proposal, as modified by the committee, appeared in the last sentence of Section 1 of the committee's article on health, education and welfare, and read:

"No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."

This is identical with the last sentence of article VII, section 1 of the constitution.

The changes made by the committee are apparent and significant. Delegates Johnson and Coghill had wanted to prohibit the use of public funds for the direct or indirect support, operation or maintenance of non-public schools, and had specifically included "transportation and other auxiliary services." The committee changed this to a prohibition only against "direct benefit" to such schools, without mention of transportation or other auxiliary services. The meaning of this change is inescapable: the committee rejected the thought that transportation and other auxiliary services should be precluded by the ban against the use of public funds for the direct benefit of private schools. There is no question

18. 1 Willoughby, Constitutional Law, § 31, at 52 (2d ed. 1929).

19. 1 Willoughby, Constitutional Law, supra, at 52, and § 32 at 54. See also 2 Sutherland, Statutory Construction, § 5001, at 491 (3d ed. 1943).

20. Knowlton v. Moore, 1900, 178 U.S. 41, 95. 20 S.Ct. 747, 78S. 44 L.Ed. 909, 991. See also Shelley v. Kraemer, 1948, 334

U.S. 1, 23, 68 S.Ct. 826, 92 L.Ed. 1161, 1186.

21. Alaska Constitutional Convention, Proposal No. 6, Education, November 17, 1955.

22. Alaska Constitutional Convention, Report of Committee on Preamble and Bill of Rights on Committee Proposal No. 7, December 15, 1955.

but that this was its intent. During debate on the floor the chairman of the committee stated, in answer to a question, that the committee had given Johnson and Coghill's proposal correct attention and rejected it permanently.²³ It obviously did not consider that transportation of children had any legitimate bearing on the support, operation or maintenance of a school or that it would constitute a direct benefit to a school.

This did not end the matter. When the committee proposal on education came to the floor of the convention, Delegate Coghill moved to amend the section involved so that not only direct, but also indirect benefit would be prohibited.²⁴ A portion of the debate that followed has been mentioned by the majority. But there was more that has not been referred to, and it merits consideration. It is revealing in showing that the convention thoroughly considered the implications of a prohibition against indirect benefit, and in showing, by a rejection of the proposed amendment, what was intended to be forbidden and what was not.

Delegate Ralph Rivers, in arguing against the amendment, pointed out what might be involved if indirect benefit were prohibited, i. e., the possibility of not being able to effectuate a legitimate public purpose because of incidental advantages that might result to a private concern. He said:

" * * * if there is a public purpose for which money is to be expended it does not matter if some of it does result in an indirect benefit to some private concern, which may be a contractor; so I definitely don't want to see the words 'or indirect' inserted in this section."²⁵

Delegate Coghill was asked how indirect benefits might accrue to a private school. He answered by saying that there would be nothing wrong with the state making "any social welfare, health arrangements * * *

with any private or parochial institution", because they would be on a "contractual basis and would be providing a service to the public and not to the institution." He saw nothing wrong with providing a hot lunch program with Territorial money or providing a health program in a school, saying—

" * * * I do not deny that to the private school because I feel that it is an instrument of public benefit because a child is benefiting from it from the public standpoint * * *"²⁶

This is significant. If the author of the restrictive amendment considered that state health and welfare arrangements with a private school would not be banned by a prohibition against indirect benefit, then it is impossible to understand how state arrangements for transportation of children to the private school could amount to a direct benefit to such school.

On the other hand, Delegate Coghill appeared to contradict himself later. He was asked what effect the proposed amendment would have on children's foster homes which, in addition to caring for the bodily needs of children, also provided education. Delegate Coghill stated that the foster homes "would be deriving an indirect benefit of some sort or another."²⁷

This statement must be considered in connection with a memorandum from the Director of the Alaska Department of Public Welfare which was then read to the convention. It listed the schools in Alaska, operated by private and religious organizations, to which the Territory was paying monies through the Welfare Department.²⁸ The delegates may well have believed, considering these facts along with Delegate Coghill's last statement, that to forbid any indirect benefit would be so prohibitive as to restrict the furnishing of needed welfare services.

23. Alaska Constitutional Convention Minutes, Jan. 9, 1956, p. 60.

24. Id. at 53.

25. Id. at 57.

26. Id. at 62-63.

27. Id. at 67.

28. Id. at 67-68.

When the proposed amendment finally came to a vote, it failed by 19 to 34. Delegates Coghill and Johnson, who had wished to prohibit bus transportation for children not attending public schools, voted in favor of the restrictive amendment. The entire committee which had formulated the section on education and had rejected the proposal of Delegates Johnson and Coghill voted against the amendment.²⁹

Finally, in connection with a motion which was later defeated to strike all of the last sentence of the section on education, Delegate Victor Rivers asked why the committee had used the words "direct benefit" instead of "support or benefit."³⁰ A member of the committee, Delegate Armstrong, answered this as follows:

"As I recall, Mr. President, we probably discussed the question of the support but we did not feel it needed to be in this particular section, and I don't recall, Mr. Rivers, that we considered that as part of the text. I certainly would agree with what Miss Awes has said, although we discussed in Committee *such things as direct legislation for the building of a school or the maintenance of a private school, which would be support, but it was our understanding that that would be covered under this word 'direct benefit'. This would prohibit the direct appropriation or building and maintenance of private institutions.*"³¹ (Emphasis added.)

This shows clearly what the committee had in mind. It discloses the meaning of the words "direct benefit", i. e., the building or maintenance of private schools. It was not intended to preclude incidental aid that might result to a private educational institution as a by-product of the expenditure of public funds otherwise legitimate, such as those for health and welfare services.

I submit that this record of the convention proceedings merits the attention of the

court. The proposal of Johnson and Coghill to prohibit bus transportation for a certain class of children, and its definite rejection by the committee and by the convention as a whole, certainly ought to be of great value in determining the meaning of "direct benefit" as it relates to school bus transportation. The discussion that took place on Coghill's motion to prohibit any indirect benefit, and its rejection by the convention, should make it clear that all the convention wanted to prevent was the use of public funds for the establishment and maintenance of other than public schools, or as Delegate Armstrong put it, for the "direct appropriation or building and maintenance of private institutions." The delegates realized that in attempting to effect a necessary good, such as the care and education of homeless children and the protection of their health and safety, that the state might not in all cases be able to avoid incidentally aiding other interests which could not be benefited by direct action. It did not wish such a possibility to frustrate the accomplishment of the common good. That is why only direct and not indirect benefit was prohibited.

It is abundantly clear that those who formed the constitution did not wish to stop the payment of public monies directly to a religious or other private institution that cared for needy children, even though such institution also furnished education for those children. But if this does not constitute a direct benefit to such institution, then I fail to see how there is a direct benefit to a parochial school if public funds are paid to a school bus contractor who allows the children to ride over established public school bus routes. If the latter involves an unlawful expenditure of public funds, as the majority holds it does, then so must the former. As a practical matter, this court has construed the prohibition against direct benefit so as to forbid also any in-

29. Id. at 70-71.

30. Id. at 76. "Support or benefit", not modified by "direct" or "indirect", is the

language used in the Territorial Organic Act, as noted earlier in this opinion.

31. Alaska Constitutional Convention Minutes, Jan. 9, 1956, p. 70.

direct benefit. In so doing it has logically committed itself to a harmful and restrictive interpretation of the constitution which will prevent the legislature from effectuating legitimate and needed results in the field of general welfare.

3. *Benefit to the School.*

This court states flatly that the furnishing at public expense of transportation for a child who attends a non-public school constitutes a direct benefit to such school. This is a gratuitous assumption. It finds no justification in the language of Chapter 39. It finds no support in the record of this case and little, if any, support in the decisions of other courts. Considered purely as an assumption, it is irrational.

In Chapter 39 the legislature authorized transportation for children attending non-public schools on a substantially equivalent basis with children attending public schools. It did this for two clearly expressed reasons: to achieve the objectives of the Alaska compulsory education law, and to protect the health and safety of school children.

Both considerations were legitimate ones. A child could comply with the compulsory education statute by attending a private as well as a public school, and he would be excused from the statutory requirement if he lived more than two miles from a school and transportation was not furnished.³² It made sense, then, to make transportation available to the child going to the private school in order to assure that the right of attending such a school, and thus to be in compliance with compulsory education requirements, would be real.

The protection of health and safety was no less a proper concern of the legislature. It is inconceivable that this could be challenged or denied. It is a matter of common knowledge that today's highways with today's motor vehicles are extremely dangerous, especially to children. Any rational person knows the hazards a child is subject to in walking long distances in extreme sub-

zero weather, such as exists in the winter months in Fairbanks where this case arose. If proof is necessary, it can be found in the record. There was evidence of a dangerous thoroughfare, with no sidewalks, where children had to walk in order to reach the parochial school. There was evidence of winter temperatures in the vicinity of sixty degrees below zero. There was the incident of first and second grade children walking over one mile from school in weather so cold that two little boys involuntarily urinated and the urine froze to their underwear and clothing. There were cases where other parochial school children had suffered from frozen noses and toes.

These dangers to children are real and not illusory. The provisions made in Chapter 39 have a substantial relation to the public health, safety and welfare. The legislature had the right to concern itself with the needs of children—even those who exercised their constitutional right to attend other than a public school. It had no difficulty in expressing its will—in declaring a legitimate public interest. There was not left to the judiciary the task of imputing to the legislature an undeclared intent and purpose, such as that of aiding or benefiting private schools. It is not the prerogative of this court to say that the purpose of Chapter 39 is not what the legislature said it to be.

There is no evidence in this case creating the slightest inference that transportation of children benefits a school. Thus, the statement by this court that there is such a benefit is not a fact but a mere supposition. And as a supposition it is unwarranted.

The same indefensible assumption appears to have been indulged in by the New York Court of Appeals in *Judd v. Board of Education*, a decision upon which the majority of this court appears to rely. In that case it was said:

" * * * Free transportation of pupils induces attendance at the school.

32. § 37-7-1, ACLA 1949.

The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and makes a success of the schools as organizations.' * * * Without pupils there could be no school. 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, accommodations and other facilities are such an aid.

* * * " 33

I fail to see how it can be said that the purpose of transportation is to promote the interests of the private school. The legislature, in Chapter 39, has said that the purpose of transportation is to assist children in reaching their schools and to safeguard their health and safety.

I fail to see how one may properly assume that if transportation is not provided for children attending the Immaculate Conception parochial school at Fairbanks that the school would provide it at school expense. I could just as readily and properly assume that in this situation the parents would furnish transportation at their expense.

I do not see the justification for assuming that if a specified number of children dropped out of the parochial school because of lack of public transportation, that this would result in detriment to the school. One would be as justified in assuming that in such circumstances those children's places would be promptly filled by other children who had desired to attend but had been unable to because of crowded classrooms.

If public funds had been used for the construction or maintenance of the Fairbanks parochial school, then I could see where there would be a direct benefit to the school. But I fail to see where there is any benefit when public monies are spent, not for those purposes, but solely for the

purpose of aiding children in getting to the school. It seems to me that as children are encouraged to attend school and are given assistance in getting there, there will be an increased need and demand for additional school facilities. This, logically, will result in additional cost to the school. Thus, the money spent by the state for transportation of school children cannot really benefit the school. The effect of such transportation, if more children will attend school when transported, will not be advantage and profit, but will be just the opposite—increased costs and expenses.

The practical holding in Judd was that as children are assisted in reaching school, there results an increased enrollment, and that this benefits the school because it would "build up", strengthen and make successful the school as an organization."³⁴ But even if it could be established that Chapter 39 had a substantial effect on the enrollment in the Immaculate Conception School at Fairbanks, this would not be a "benefit" in the constitutional sense. The fact that more children attend a school does not necessarily aid the school. In fact, I would think that this would have the opposite effect by increasing the demands on the school and the costs of operation. It would be only when the school was able to find ways of meeting those additional costs, without help from the state, that the results mentioned in the Judd case might be attained.

The transportation of children to school, whether it is by the parents or by the state, does not promote the advantage, prosperity or good of the school, despite the statement in the Judd decision that "without pupils there could be no school." An extension of this truism is that without a school there would be no expense of providing a school. I cannot see, then, the existence of any benefit, other than to the child and to society, in aiding the child in reaching a school which would not exist if children were not there to receive edu

33. 1938, 278 N.Y. 200, 15 N.E.2d 576, 582, 118 A.L.R. 759.

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34. Judd v. Board of Education, supra note 33, 15 N.E.2d at page 582.

cation, and which would exist, if children were there, only at considerable cost.

In an effort to bolster its conclusion that transportation directly benefits a school the majority of this court also relies upon arguments made in minority, dissenting opinions in the *Everson* case—both in the New Jersey Court of Errors and Appeals³⁵ and in the United States Supreme Court.³⁶ I fail to see where those arguments aid this court in its conclusion. But if they are thought to be of assistance, then as applied to the issue involved here they amount in substance to this: (a) Payments made for text books, school lunches, athletic equipment, teachers' salaries, tuitions, buildings, equipment, and necessary materials presumably benefit the child. (b) But those payments also constitute a direct benefit to the school. (c) Therefore, since transportation directly benefits the child, it also directly benefits the school.

Such an argument, of course has no substance. It says that since certain things directly benefit both the child and the school, then other things related to education which directly benefit the child also must necessarily directly benefit the school—whether in fact this is so or not. Obviously this won't stand the test of logic.

In relying upon such unsound reasoning, I think the court has lost sight of what is really involved in this case. The point is not that payments for textbooks, school lunches, teachers' salaries, buildings, etc., do not constitute a direct benefit to the school. Those things are not involved in this action. What is involved, and the only thing, is whether transportation confers a direct benefit on a school. I say that transportation directly benefits a child and his parents; but that there is no basis in fact or reason for holding that it also

directly benefits a school. That is the point.

In a final attempt to vindicate its claim that transportation of children confers a direct benefit upon a school, the court states that this was the view expressed by the courts of Delaware, New York, Oklahoma, Washington and Kentucky. I think that the decisions made by those courts furnish little, if any, support for the majority's point of view.

There are only two decisions that have any real pertinency, and they are of no assistance. In New York, aid or support to a religious school, "directly or indirectly", was prohibited by the constitution. In passing upon the validity of a transportation statute, the New York Court of Appeals obviously considered that transportation constituted an indirect and not a direct aid. The court said:

"Aid or support to the school 'directly or indirectly' is proscribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes * * * The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it."³⁷

Similarly, in Oklahoma there was a constitutional prohibition against the use of

35. *Everson v. Board of Education*, 1945, 133 N.J.L. 350, 44 A.2d 333, 338-343.

36. *Everson v. Board of Education*, 1947, 330 U.S. 1, 47-49, 67 S.Ct. 504, 91 L. Ed. 711, 740.

37. *Judd v. Board of Education*, 1938, 278 N.Y. 200, 15 N.E.2d 576, 582, 118 A.L.R. 759, reargument denied 1938, 278 N.Y. 712, 17 N.E.2d 134.

public money for the use or benefit, directly or indirectly, of any sectarian institution. The Supreme Court of Oklahoma did say that "The appropriation and directed use of public funds in transportation of public school children is openly in direct aid to public schools 'as such'", and that when such aid was extended to a sectarian school there was a clear violation of the constitution.³⁸ But it followed this by also stating that its conclusion was "fully supported by the reasoning and conclusion" in the New York case of *Judd v. Board of Education*.³⁹ The *Judd* case furnished no such support, since its holding was that transportation conferred aid that was indirect, and not direct. Hence, the Oklahoma court's view that there was direct aid is not convincing.

Decisions of the courts of Delaware, Kentucky and Washington⁴⁰ are of even less value, since none of the constitutional provisions involved used either the words "direct" or "indirect." In addition, Washington relied in major part on the *Judd* decision, and Kentucky, upon the *Gurney* case in Oklahoma which in turn had based its conclusion on *Judd*.

The majority has failed to point to any clear cut decision of another court where there was directly involved the question of whether transportation amounted to direct or indirect aid to a school, and where the determination was made that it was direct aid. It was only in the *Judd* case that this was given any real consideration, and the decision there can be used only as precedent for a determination that transportation confers an indirect benefit upon a school. The Alaska constitution does not forbid that.

The holding that transportation of children, as authorized by Chapter 39, confers any benefit upon a school is indefensible, in fact and in reason. I submit that the majority of this court has rendered a judgment on social policy which properly should be left to the legislature. In practical effect the court has held that the legislature may not provide for the public welfare despite the fact that it possesses this authority, both traditionally and under the state constitution. The court does not have the power on such grounds to nullify a legislative act, for to concede the power would be to make the court sovereign over the legislature, the constitution and the people, and convert the government of this state into a judicial despotism.

4. *Legislative Purpose.*

The court is critical of one of the legislative purposes expressed in Chapter 39, i. e., the protection of the health and safety of all school children in Alaska. It points out that no transportation is provided for non-public school children who do not live along public school bus routes, nor for those children who live within one and one-half miles from the schools they attend.⁴¹ The court concludes from this that Chapter 39 does not effectuate the announced legislative intent.

I do not know what purpose is served by this portion of the majority's opinion, unless it was intended to suggest by inference that the legislature had some ulterior motive in enacting the statute—its stated objective being a mere fiction—and that for this reason the act was not an appropriate exercise of police power or did not really serve a public purpose.

38. *Gurney v. Ferguson*, 1941, 190 Okl. 254, 122 P.2d 1002, 1004.

39. *Id.*, 122 P.2d at page 1004.

40. *State ex rel. Traub v. Brown*, 1934, 6 W.W.Harr. 181, 36 Del. 181, 172 A. 835, writ of error dismissed 1938, 9 W.W.Harr. 187, 39 Del. 187, 197 A. 478; *Sherrard v. Jefferson County Board of Education*, 1942, 294 Ky. 469, 171 S.W.2d 963; *Mitchell v. Consol. School Dist. No. 201*, 1943, 17 Wash.2d 61, 135 P.

2d 79, 146 A.L.R. 612; *Visser v. Nooksack Valley School Dist. No. 506*, 1949, 33 Wash.2d 689, 207 P.2d 198.

41. The Commissioner of Education is authorized by regulation to enter into contracts for the transportation of pupils "who reside a distance of one and one-half miles or more from the school they are required to attend." 4 Alaska Adm. Code § 100(a), at 37.

Long prior to the enactment of Chapter 39 transportation for school children was provided by virtue of a law conferring upon the Territorial Board of Education the power and authority to "Provide for the transportation of pupils who reside a distance from established Schools."⁴² In its practical operation this statute was construed as applying to children attending public schools, but even here *all* public school children did not receive the benefits of the law. Under limitations prescribed by the Board of Education, children were permitted to ride school buses only if they lived beyond a certain distance from their schools, and other children were afforded no transportation if there were not a sufficient number of them living in a certain area to justify the establishment of a transportation route. This is precisely the situation contemplated by existing regulations of the Commissioner of Education. They provide that a transportation route may not be established where there are fewer than eight children who are residents living along a regularly maintained highway; that extensions to routes already established may not be made unless there are at least three children and the extension is a regularly maintained highway; that a route extension may not be established for a one-way distance of less than one mile; and that a transportation route must be discontinued if the average number of children transported falls to five or below for two consecutive months.⁴³

Thus, the fact that literally "all" school children in Alaska were not given transportation under Chapter 39 is not a circumstance peculiar to children attending non-public schools. It is applicable to the same extent to children attending public schools. It is apparent, then, that when the legislature in 1955 for the first time extended the assistance of transportation to non-public school children and spoke of "all school

children in Alaska", it was expressing its legitimate concern for a class of children who up to that time had been discriminated against. The phrase "all school children" obviously was intended to refer to the fact that all children, regardless of whether they attended a public or non-public school, were entitled to transportation if they were otherwise qualified under applicable regulations of the Board or Commissioner of Education. It was never intended that children attending non-public schools would receive benefits over and above those accorded the children attending public schools. If this had been the effect of the statute, there is little doubt but that the court would be even more critical of such an arrangement because of the resulting discrimination against public school children.

The majority, therefore, is not justified in stating that Chapter 39 does not effectuate the intent of the legislature expressed therein. But even if this were so as it relates to health and safety, the statute still would not fail for a lack of a proper legislative motive. The act does not relate only to health and safety; one of its declared purposes is to "achieve the objectives of the compulsory education laws of Alaska."⁴⁴ This alone would be a sufficient consideration; for legislation intended to facilitate the opportunity of children to get to school, both public and non-public, serves a distinct public purpose.⁴⁵

The majority makes a further attempt to justify its criticism of the legislative objective by stating that neither inclement weather nor highway traffic hazards were used as a justification for the first law passed in Alaska to provide transportation for school children. The court states that distance from school seems to have been the motivating force for legislation at that time.

I have no quarrel with the proposition that distance may have been a prime factor.

42. SLA 1933, ch. 114, § 1 (§ 37-2-8, *ACLA* 1949).

43. 4 Alaska Adm. Code § 100(a), at 37.

44. SLA 1955, ch. 39, § 1.

45. *Everson v. Board of Education*, 1947, 330 U.S. 1, 7, 67 S.Ct. 504, 91 L.Ed. 711, 719; *Snyder v. Town of Newtown*, 1960, 147 Conn. 374, 161 A.2d 770, 774, appeal dismissed 81 S.Ct. 692, 5 L.Ed.2d 688.

But this does not mean that health and safety were not legitimate factors. If one thinks only a little about winter weather conditions and the hazards of automobile traffic, it should be apparent that as the distance a child must travel by foot increases so do the hazards to his safety. Distance bears such a real and substantial relation to health and safety that the two cannot be considered as separate motivating forces which influence legislatures to provide transportation for school children. In the light of realities of contemporary living, it is astounding that the court would suggest that health and safety were not factors which the legislature had in mind in authorizing transportation of school children at public expense.

Chapter 39 in fact has a real and substantial relation to the health, safety and welfare of school children, despite the majority's suggestion to the contrary. This court is not justified in denouncing the legislative motive or the legislative arrangement because literally "all" school children in this state are not transported to their schools. The legislature may do what it can to accomplish what is deemed necessary for the public welfare, and stop short of those cases where the detriment to a few, not afforded state aid, is considered less important than the expense or inconvenience to the state which might result if the rule laid down were mathematically exact. Transportation of school children is

an expensive undertaking⁴⁶, and the legislature may well have felt that the state could not afford to provide transportation for every child in the state and for every distance traveled. "The problems of government are practical ones and may justify, if they do not require, rough accommodations,—illogical, it may be, and unscientific."⁴⁷ It is not within the proper scope of judicial review for this court to sit as a superlegislature and decide whether the statute is fair or unfair, or wise or unwise, or whether it has gone far enough in accomplishing a public purpose.⁴⁸

5. Conclusion.

The basic, underlying controversy which gave rise to this litigation is not disclosed by the briefs or by the opinion of this court. But it does exist and should be recognized.

Those who would deny transportation for children attending non-public schools are not concerned with transportation as such. Nor are they truly solicitous about the relatively minor expense to the state which will result from the operation of Chapter 39.⁴⁹ Their real anxiety, and the real issue in this case, has to do with the very existence of the sectarian or religious educational institutions, and the belief of some persons in the supremacy of public education administered and controlled by the state.

This was evident from proceedings of the Constitutional Convention. Delegate Proposal No. 6, mentioned earlier in this opin-

46. See note 49, *infra*.

47. *Metropolis Theater Co. v. City of Chicago*, 1913, 229 U.S. 61, 69, 33 S.Ct. 441, 443, 57 L.Ed. 730, 734.

48. *Day-Brite Lighting Co. v. State of Missouri*, 1952, 342 U.S. 421, 423, 72 S.Ct. 405, 98 L.Ed. 469, 472; *Berman v. Parker*, 1954, 348 U.S. 26, 32, 75 S.Ct. 98, 90 L.Ed. 27, 37; *California State Auto Ass'n, etc. v. Maloney*, 1951, 341 U.S. 105, 110, 71 S.Ct. 601, 95 L.Ed. 753, 793; *Watson v. Buck*, 1941, 313 U.S. 387, 403, 61 S.Ct. 962, 85 L.Ed. 1416, 1425; *Sunshine Anthracite Coal Co. v. Adkins*, 1940, 310 U.S. 381, 394, 60 S.Ct. 907, 34 L.Ed. 1263, 1272.

49. The appellants have furnished this

court with a copy of a memorandum, dated April 27, 1960, from Dr. Theo J. Norby, Commissioner of Education, to Ralph E. Moody, Attorney General of Alaska. This memorandum indicates that if the lower court's decision had been upheld, the additional expense of providing transportation for non-public school students in 1961 would be \$17,937.25. It is interesting to note that the total legislative appropriation for "pupil transportation" in 1960 was \$1,197,197.00 (SLA 1960, ch. 182, § 1, at 239), and that the amount requested in the Governor's budget for fiscal year 1961-62 was \$1,300,000 (House Bill 42, First Session, Second Alaska Legislature, 1961, at 6).

ion, did not deal solely with the subject of the use of public funds for private schools. That proposal spelled out in detail how education should be handled in the new State of Alaska. Section 2 provided that "The State's responsibility for the education of its people is here declared to be clear, positive and final." Section 4 would have required the legislature to provide "for the compulsory attendance at some public school, unless other state approved means of education are provided." Section 6 would have permitted the legislature to provide "for the establishment of private schools by individuals, groups, institutions or corporations", but only "under charter from the state." That section also would have required the state to establish undefined "minimum educational standards for such schools", and would have allowed the teaching in private schools of principles over and above the state requirements, provided that such teachings "were not otherwise contrary to the statutes or the constitution of the state."

During debate on the floor of the convention, Delegate Coghill, a co-author of proposal No. 6, stated that he was President of the Association of Alaska School Boards and "one of the framers of that twelve-point program we developed in Anchorage last October."⁵⁰ That program, which had been widely disseminated among the delegates, was a five page document entitled "Basic Principles of Education to be Included in the Constitution for the State of Alaska", and it stated that it had been formulated and approved by the Alaska School Boards Association and the Superintendents' Advisory Commission at a meeting in Anchorage in October 1955. Since the recommendations and discussion in this document coincide in relevant part with Delegate Proposal No. 6, it is fair to presume that those portions of the proposal discussed here reflected the philosophy of education, not just of the delegates who submitted the proposal, but also of the of-

50. Alaska Constitutional Convention Minutes, Jan. 9, 1956, p. 58.

ficial representatives of public education in Alaska.

The basic thesis which runs through the proposal is that education is primarily, if not exclusively, the prerogative and function of the state; that the state is supreme in this field. Evident is the clear implication that the state should have the right to determine in the first instance whether a private school should even be allowed to exist, and if so, then what it should or should not be permitted to teach. Perhaps there is even implicit here a resentment or fear toward the existence of the private schools—a thought that was revealed by Delegate Coghill when, during debate on the floor of the convention, he said that "sectarianism segregation in our educational system is bad for the children",⁵¹ and "The people that are sending their children to private parochial or any other type of institution are segregating themselves from the public and therefore they should not derive the benefit from the tax dollar."⁵²

Such a philosophy of education was totalitarian in concept; the objective obviously being to standardize children by forcing them, practically, to accept instruction from public school teachers only. It ignored the fact that the child is not the mere creature of the state; it denied the natural right of parents to direct the destiny of their children. It had no proper place in the organic law for the State of Alaska, as the convention ultimately decided by rejecting the proposal.

That constitutional history is important to consider in the background of the present controversy over bus transportation. The effort to place all education under the complete dominion of the state failed to succeed as a constitutional measure. The United States Supreme court's decision in *Pierce v. Society of Sisters*, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, was a bar to any possible legislative enactment that would compel attendance at public schools only. The next logical step, then, was to

51. *Id.* at 59.

52. *Id.* at 64.

restrict as far as possible the enjoyment of the right to education not exclusively controlled by the state. The opponents of the right thus sought to bar the extension of general welfare benefits to children who did not attend a public school by attempting to insert a constitutional provision against the use of public funds for any indirect benefit to a private school. They were unsuccessful at the convention, but their defeat has now been turned into victory by the court's decision in this case.

In the *Pierce* case the Supreme Court of the United States held that a statute which compelled attendance at public schools unreasonably interfered with the liberty of parents and guardians to direct the upbringing of children under their control. The court said:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 53

This liberty of parents to choose the kind of education to be given to their children, so clearly stated in *Pierce*, has lost much of its effectiveness and meaning by the majority's decision in this case. Because of the economic and social realities of contemporary living, there undoubtedly will be parents who will now find it impracticable or impossible to continue sending their children to the parochial school. To them, the constitutional and natural right to educate their children in schools of their own selection, and to thus express their conviction

of the importance of religious and spiritual ideals in the formation of character, will be an abstract thing, without practical meaning or value.

The transportation of school children provided by Chapter 39 is a benefit common and necessary to public and non-public school children alike. To grant this assistance to some children, and deny it to others unless they forego their freedom of choice of schools, embodies the element of unfair treatment which is so foreign to our American tradition. The concept of liberty and equality of man was expressed in the high purpose and noble convictions of our forefathers who signed the Declaration of Independence. It was again given expression with classic dignity by the men and women who formulated the constitution for the State of Alaska when they said that "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; * * *." 54

This truly is the American idea—the American tradition. It is the reason for our nation's being; it has been America's strength. But today in Alaska that idea has become an abused phrase. The reality behind it has been obscured by the court's decision in this case; some of its power and meaning have been lost. Those persons who exercise their inherent right to direct the destiny of their children must now pay the price of being denied the equal rights to which the constitution says they are entitled.

This court's decision is a grave injustice to many citizens of this state.

The judgment below should be affirmed.

53. *Pierce v. Society of Sisters*, 1925, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 1078.

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54. Alaska Const. art. I, § 1.