HJR 16

<TARGET><BILL>HJR 16</BILL><SUBJECT>HJR 16</SUBJECT><COMM>HEDC27</COMM></TARGET>

[redacted]OUSE COMMITTEE REPO[redacted]

(7)
Date Referred to Committee: February 9, 2011

FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: 4/6/11

The EDUCATION Committee considered: **HJR 16**

HOUSE JOINT RESOLUTION NO. 16
Proposing amendments to the Constitution of the State of Alaska relating to state aid for education.
HJR 16-CONST. AM: EDUCATION FUNDING

Recommends it be replaced with [ ] HCS *or* **[ ] CS** *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Peggy Wilson	WILSON		X		
	Pruitt			X	
Paul R Seaton	SEATON		X		
	KAWASAKI		X		
	FEIGE			X	
Chair:	Dick				
Chair:					

ALASKA STATE LEGISLATURE

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REPRESENTATIVE WES KELLER
DISTRICT 14
SPONSOR STATEMENT

HJR 16

"Proposing amendments to the Constitution of the State of Alaska relating to state aid for education."

For 50 years the State of Alaska has grow from a vast frontier into an important player in the nation and the world. While this is a fair assessment of ourselves, it does not address a growing need for quality higher education in the state. We have and continue to do everything possible for our university system, but that has, to a point, been at the expense of other private institutions of higher learning.

HJR 16 opens some of these doors for both public and private education by allowing the release of funds to more than just public schools. This Constitutional Amendment allows those students seeking to excel in secondary and post secondary education to attend a school that meets their needs.

This resolution is on the table with HB 145, but the language in this resolution goes far beyond this bill. It takes into account state sponsored scholarships for all students regardless of financial position. It says we support higher education for our youth at the best possible college, university or vocational program. Alaska has a wealth of educational opportunities that need our support. We do not need another Sheldon Jackson disaster.

HJR 16 is language that needs to be placed in front of the Alaska voters so they may decide on the future of higher education in the state.

E-Mail: Representative_Wes_Keller@legis.state.ak.us
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HJR 16**
() Publish Date

Identifier (file name) HJR016-OOG-DOE-3-17-11
Dept. Affected: Office of the Governor
Title: Constitutional amendment relating to state aid for education
Appropriation: Elections
Allocation: Elections
Sponsor: Representative Keller
Requester: House Education Committee
OMB Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services			1.5				
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF			1.5				
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Gail Fenumiai, Director — Phone: 465-2644
Division: Division of Elections — Date/Time: 3/17/2011, 3:08pm
Approved by: Linda J. Perez, Administrative Director — Date: 3/17/2011
Administrative Services

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HJR 16

Passage of this resolution would require the constitutional amendment to appear on the 2012 general election ballot. The cost of providing information about the constitutional amendment in the Official Election Pamphlet, as required by AS 15.58, is $1.5. Should the addition of this question require printing an 8-1/2 by 18 inch ballot, the cost will increase to $22.0.

Alaska State Legislature

Please enter into the record my testimony to the House Finance Committee
Committee name

Committee on HJR 16, dated February 28 2012
Bill/Subject

I, Joshua Bartels, believe that a parent of a child should be allowed to spend the money they would on public school, on an education of their choosing. It is the people who are paying taxes for the education, so it should be up to the people to vote on this matter.

Signed: Joshua Bartels
Testifier

Myself
Representing (Optional)

P.O. Box 873510 Wasilla, Ak 99687
Address

(907) 775-7286
Phone number

Alaska State Legislature

Please enter into the record my testimony to the House Finance Committee
Committee name

Committee on HJR 16, dated 2/28/12
Bill/Subject

I believe that if a person pays taxes, they should be able to make the choice regarding what school that their children go to. I feel that by allowing that money allotted to one child to be available to the parents, that it opens up options for the students that maybe a better fit and that would not be otherwise available. I feel that if a student is not working well within the public school district the parents should be able to put them in a program that would be more appropriate for them, without having to worry about funds that would otherwise be used to help the students. I think it should be opened to the public to vote since it affects them the most.

Signed: Aliya G. Mullins
Testifier

Self
Representing (Optional)

P.O. Box 873512 Wasilla, Ak 99687
Address

(907) 775-1798
Phone number

Alaska State Legislature

Please enter into the record my testimony to the House Finance Com.
Committee name

Committee on HJR 16, dated Feb. 28, 2012.
Bill/Subject

What is the fear concerning allowing the voters of this state to decide about school choice. Government money is OUR money. Let us decide. Parents know best as to what is needed for their children.
Encourage you to pass HJR 16.
Allow the people to decide.

Signed: Cindy Thomas
Testifier

Self - Conservative Patriots Group.
Representing (Optional)

915 Colonial Park Wasilla
Address

376-5124
Phone number

Alaska State Legislature

Please enter into the record my testimony to the House Finance
Committee name

Committee on HJR 16, dated Feb. 28, 2012
Bill/Subject

To House Finance Committee,

Please kill bill HJR16. This bill will in no way improve education ~~[illegible]~~ in the State of Alaska. Our public schools currently take all students. Parents have many choices beyond their neighborhood school. This bill WILL allow private organizations to collect public monies, while EXCLUDING whomever they feel are unworthy to attend their institutions: children with learning disabilities, limited English, behavioral issues - all of whom are currently welcomed in our public schools. expensive to educate and

Signed: Susan L. Dunham
Testifier

Representing (Optional)

P.O. Box 1436 Palmer AK 99645
Address

907 745-1261
Phone number

Alaska State Legislature

Please enter into the record my testimony to the House Finance Committee
Committee name

Committee on HJR 16, dated 2-28-12
Bill/Subject

As a former straight A high school student who dropped out of high school, I challenge the notion that vouchers will solve the drop out rate. During drop out exit interviews, most students drop out due to family issues or a need to get a job. This was the case in my own life. There wasn't anything wrong with my teachers ~~or~~ my school. They were awesome teachers who challenged me and it is because of their caring and academic stimulation that I went back to school later in my life to become a teacher. Vouchers will just undermine our current education system allowing private schools to pick from the cream of the crop. You will actually help to decrease our public schools graduation rates.

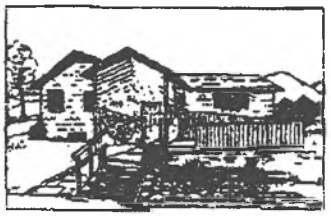
Signed: Tracey H. Martin
Testifier

Representing (Optional)

PO Box 879538, Wasilla, AK 99687
Address

907-[redacted]-357-9389
Phone number

Church of the Covenant
An American Baptist Church



415 S. Bailey
Palmer, Alaska 99645
907-746-2907

Free to Think
Bound to Serve

Sarah Welton, Pastor
Home 907-376-8577

HJR 16 is to change the constitution to allow public moneys to go to private and religious schools. The wording makes it so that the money goes to the students for education but this is just another way to fund religion. Students and families have a right to choose the education of their children but not fund religious or private schools with public money.

- The public schools do a very credible job when one looks at the enormity of the situation, the inconsistencies and happenstances of human differences, the regulations, meeting the needs of all students not just the well behaved, middle class, healthy students– but all students. The recent study that was done by Mat Su Schools following students after graduation attests to the quality of the schools.

- The use of public money for private and religious schools goes against my religious beliefs in the separation of church and state. Freedom from religion is as much a part as freedom of religion in my belief system. The public dollars of the state for education need to go into public education. When they go to private organizations there is no control as to what they will be spent for even if one says and puts into place regulations that say there can be no discrimination or other conditions, there will be. The funds will be used to supplant the usual funds for education that the organizations have. The issues of providing money to religious organizations for education means that they will be promoting their faith with public dollars that normally would be spent on education but is back-filled with public money.

- It will not make education better but worsen the issues that already exist.

- Most of our public education dollars go for the people who deliver education because we believe that highly qualified, dedicated people are

needed to provide the instruction. Taking away dollars essentially increases class sizes, adds stress to the delivery of education, and promotes inequality. The students who are struggling will be left in the public schools as the private schools will figure out ways to dismiss them. The students with special accommodations for any reason will be left out maybe not at first but eventually the drain on resources will be felt enough to marginalize those who need more resources and the public schools will be hurt by the inequality.

- In my opinion this change in the constitution opens the door to publicly funding religion in other ways as well. It also takes away the appropriate use of public education dollars. It will create haves and have nots; it will create separation; it will open the door to funding religion on a grand scale. We have forgotten or maybe we never knew of the struggles of the people who came before us concerning separation of church and state. My particular church history is steeped in it. People left their homelands and settled in the new world to keep religion out of state affairs.

Sarah R. Welton

02/28/12

Marilyn Davidson, Asst. Superintendent
Kodiak Island Borough School District
mdavidson01@kibsd.org
907-481-6200

(House Joint Resolution 16)

I need to share my concerns in regard to HJR16 and the constitutional amendment that it proposes. This proposal is not a good idea and I urge you to NOT move it forward.

My concerns regarding this measure revolve around the idea of opportunities to serve students, to build our future in the state in the way that families and communities want their children to be served.

Public schools have been built around ideas of equal opportunities for all who come to our doors. Public schools have been held to high standards for all students—those who come from economically disadvantaged homes, those who come with disabilities of all kinds, those who come speaking languages other than English, those who have parents who support their academic work, those who have parents who spend all of their effort struggling to meet the most basic needs so their child can have a chance to succeed in the ~~public~~ any school program.

Public schools are also held to ideas of equity—because we serve all, we cannot serve specific populations to the exclusion of others. We do not promote our personal beliefs in the classroom and in fact can lose licensure if we do teach our personal point of view or prefer one ideology or religion over another. Our job is to respect all of those we serve.

Public schools are also held to high requirements regarding federal mandates and requirements, graduation and attendance rates, curricular conformity requirements, provision of special education and English language acquisition programs.

Our private schools currently own the privilege of serving specifically and differently than the public schools do. They have the option of providing specific and targeted sectarian curriculum that focuses on shared beliefs and world views. They have the option of limiting their clientele to those who are in agreement with their beliefs and premises. They have the option to turn students away for whatever criteria they establish.

If there were a constitutional amendment that would allow for the funding of private and religiously based schools, this would be a granting of government money to sectarian organizations. It would seem that this could not be done without placing the same requirements on those schools as are currently placed on the public schools—requirements such as minimum enrollment; common requirements for building codes, health and safety features; common measurements of achievement regarding student progress such as standardized testing, participation rates, granting of accommodations for students with individualized plans; examination of graduation rates, attendance rates, drop out rates, etc.

Such an amendment would indeed siphon funds from our already struggling public schools. If those funds come from the public coffer, then private schools must also be required to do all that the public schools do-- with the same funding—and should

not be exclusive in any way. They should indeed take all who come to their doors as well as the public institutions do. If dollars are allocated, there must be consistent rules for all who receive those dollars.

Please do not impose the limits that are implied by this proposed amendment—limits regarding what the public schools are able to provide and limits regarding what the private schools can and should teach.

HJR 16 is not a good idea and I urge you to not move it forward in this process.

Marilyn Davidson

ALASKA FEDERATION OF NATIVES, INC.

2011 ANNUAL CONVENTION

RESOLUTION 11-05

TITLE: SUPPORTING EDUCATIONAL REFORM

WHEREAS: The Indigenous peoples of Alaska are distinct people with distinct cultures and traditional knowledge; and,

WHEREAS: There exists a need for Tribal schools to meet the cultural and academic needs of our children, who are impacted by a greater "drop-out" rate than other students in Alaska; and,

WHEREAS: Today's K-12 educational system as offered through our state and local government is not adequate for nor does it respond to the cultural needs of our Native students; and,

WHEREAS: Our state and local government have established a monopoly in that to access free K-12 education one must go to a government school; and,

WHEREAS: Creative, educational opportunities can meet the educational, cultural, and social needs of our Native children; and,

WHEREAS: Pending legislation (House Bill 145, Senate Bill 106, and HJR 16, SJR 9) will permit parental choice and innovations; and,

WHEREAS: HJR 16 and SJR 9, if enacted, would place an amendment to the Constitution on the ballot in the next general election that if passed would amend Art. VII, Sec. 1 of the State Constitution to delete language that prohibits the expenditure of public funds for the direct benefit of any religious or other private educational institution, and add language to Art. IX, section 6 which currently says no public money can be used, except for a public purpose, to say that nothing in that section shall prevent payment from public funds for the direct educational benefit of students as provided by law; and,

WHEREAS: HB 145 and SB 106, would establish a Parental Choice Scholarship Program, whereby public funding could be used to pay for the cost of K-12 education at a public or private school selected by the parent or legal guardian. The school of choice would receive the amount of funding the school district in which the student resides would have received. The legislation sets scholarship amount and eligibility, accountability and enrollment standards for a participating school and the duties of school districts. Public, private, correspondence schools will all compete for the funding that the legislature sends to school districts each year; and,

WHEREAS: The legislation allows Native parents flexibility to start new schools, or select other schools or methods designed to best respond to their children's need and government money follows; and,

NOW THEREFORE BE IT RESOLVED by the Delegates to the 2011 Annual Convention of the Alaska Federation Natives, Inc, endorses the proposed K-12 parental choice legislation.

SUBMITTED BY: AFN BOARD OF DIRECTORS

CONVENTION ACTION: PASSED

1577 C Street, Suite 300 • Anchorage, Alaska 99501 • tel 907.274.3611 • fax 907.276.7989 • www.nativefederation.org

AS 14.17.410. Public School Funding.

(a) A district is eligible for public school funding in an amount equal to the sum calculated under (b) and (c) of this section.

(b) *Public school funding consists of state aid, a required local contribution, and eligible federal impact aid determined as follows:*

(1) state aid equals basic need minus a required local contribution and *90 percent of eligible federal impact aid* for that fiscal year; basic need equals the sum obtained under (D) of this paragraph, multiplied by the base student allocation set out in AS 14.17.470 ; district adjusted ADM is calculated as follows:

(A) the ADM of each school in the district is calculated by applying the school size factor to the student count as set out in AS 14.17.450 ;

(B) the number obtained under (A) of this paragraph is multiplied by the district cost factor described in AS 14.17.460 ;

(C) the ADMs of each school in a district, as adjusted according to (A) and (B) of this paragraph, are added; the sum is then multiplied by the special needs factor set out in AS 14.17.420 (a)(1);

(D) the number obtained for intensive services under AS 14.17.420(a)(2) and the number obtained for correspondence study under AS 14.17.430 are added to the number obtained under (C) of this paragraph;

(2) the required local contribution of a city or borough school district is the equivalent of a four mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 , not to exceed 45 percent of a district's basic need for the preceding fiscal year as determined under (1) of this subsection.

(c) In addition to the local contribution required under (b)(2) of this section, a city or borough school district in a fiscal year may make a local contribution of not more than the greater of

(1) the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 ; or

(2) 23 percent of the district's basic need for the fiscal year under (b)(1) of this section.

(d) State aid may not be provided to a city or borough school district if the local contributions required under (b)(2) of this section have not been made.

(e) If a city or borough school district is established after July 1, 1998, for the first three fiscal years in which the city or borough school district operates schools, local contributions may be less than the amount that would otherwise be required under (b)(2) of this section, except that

(1) in the second fiscal year of operations, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the city or borough school district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 ; and

(2) in the third year of operation, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a three mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 .

(f) A school district is eligible for additional state aid in the amount by which the local contributions that would otherwise have been required under (b)(2) of this section exceed the district's actual local contributions under (e) of this section.

Excerpted from the book *Alaska's Constitutional Convention*, written by Vic Fischer, one of the delegates to the 1955-56 convention held at the University of Alaska in Fairbanks. When the book was published in 1975, Fischer was the Director of the Institute of Social, Economic and Government Research at the UA in Anchorage. He later served in the Alaska Legislature and is now retired in Anchorage, I believe.

From pp 140&141:

"In drafting the section on education, the committee included language that covered a standard feature of past and present statehood enabling bills, namely that 'provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all children of said state and free from sectarian control.'

"The only significant point raised in plenary consideration of the committee proposal was a suggested amendment to insert the words 'and indirect' after 'direct' in the draft provision 'No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.' Proponents of the proposed amendment stressed the importance of protecting the integrity of public education, while its opponents argued for the provision of services to the individual student if otherwise in keeping with the constitution. The proponents of the amendment to prohibit 'direct and indirect' aid to parochial and other private schools held that sectarian segregation in education is bad for school children and that inadequate restriction could lead to diversion of funds and weakening of public education. A majority (thirty-four to nineteen) opposed the amendment, agreeing with those who argued that more important than these considerations was the need to help each child attain the fullest level of individual development through programs such as free lunches, bus transportation, and even payment by the state welfare agency of room and board to parentless children, so long as the basic principle of separation of church and state was maintained."

HJR 16 Handout

ALASKA STATE LEGISLATURE

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REPRESENTATIVE WES KELLER
DISTRICT 14

MEMO

To: Representative Les Gara

From: Representative Wes Keller

Date: 2/27/12

Re: Alaska Constitutional Convention Minutes Regarding Public Money and Private Schools

Representative Gara,

In today's House Finance Committee hearing on HJR 16, you inquired as to whether we had reviewed the Alaska Constitutional Convention minutes regarding the discussion on public money going to private schools.

We have indeed reviewed the minutes and they are attached for your review.

Thank you.

Cc: House Finance Committee Members

E-Mail: Representative_Wes_Keller@legis.state.ak.us
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

PAGES 1512-1525

ALASKA CONSTITUTIONAL CONVENTION

PART 2

Proceedings: December 13, 1955 -- January 9, 1956

Alaska Legislative Council

Box 2199 — Juneau, Alaska

on the floor, the Committee did not ask to withdraw it, but I think Mrs. Hermann raised a very valid point. If this word is inserted now, we can't move later during the course of the debate to strike it. I would move that the rules be suspended and that the Committee be allowed to substitute its unanimous amendment with the thought in mind that we can then later remove it if during the course of the debate it appears to be the wish of the body to do so.

PRESIDENT EGAN: The Chair stated it could not be removed and the Chair would stand corrected to a certain point on that statement, that is by a suspension of the rules or rescinding of the action of course you could do it.

WHITE: I so move, Mr. President, and ask unanimous consent.

PRESIDENT EGAN: Mr. White, please state the motion.

WHITE: That the rules be suspended and that the Committee be allowed to submit its proposed amendment as though a part of the Committee report.

KILCHER: Point of information. Could it possibly be handled in such a manner as to have the report reconsidered and recommitted and come out again a second time?

PRESIDENT EGAN: The effect of Mr. White's motion under suspension of the rules would accomplish that. Mr. Riley

RILEY: Mr. President. I think this is in line with Mr. White's suggestion that this article of this proposal now before us be considered under a suspension of the rules, simply as a committee substitute for the same article. I think that would put the thing in motion.

PRESIDENT EGAN: Right, and have the word "educational" placed before the word "institution".

RILEY: That would enable us to work either way from that word afterwards.

V. RIVERS: That would cover my objection. I have no objection to that.

PRESIDENT EGAN: If there is no objection then, then it is so ordered, and the word "educational" has been inserted before the word "institution" as if this were a substitute committee report. Now, Section 1 is open for amendment. Mr. Hurley.

HURLEY: Mr. President, I would like to ask a question of the Chairman of the Bill of Rights Committee. Would your Committee consider in using the terminology "direct benefit" whether or not that would be a directive or a license to the legislature to appropriate money for the indirect benefits? If so, what was their conclusion?

AWES: I don't think it is a direct order to the legislature to do anything. I think we prohibited what we wanted to prohibit. I don't think that tells the legislature they are supposed to do anything else.

METCALF: I have an amendment.

COGHILL: I rise to a point of order. I submitted an amendment to this section before the noon recess, and it has never been recognized, and I was recognized by the Chair.

PRESIDENT EGAN: Were you recognized for that purpose before the noon recess? If you were, then the Chief Clerk may read the proposed amendment as offered by Mr. Coghill. The Chair feels sorry about that, Mr. Coghill.

CHIEF CLERK: "Section 1, line 7, after the word 'direct' insert the words 'or indirect'."

COGHILL: I move and ask unanimous consent.

R. RIVERS: I object.

METCALF: I second the motion.

PRESIDENT EGAN: It has been moved and seconded that the words "or indirect" be inserted after the word "direct" in line 7, Section 1.

WHITE: Point of order. I believe there was a letter presented to the Convention the other day that the Convention agreed to defer the reading of until we reached this section. It seems to me proper we hear it before we consider any business.

PRESIDENT EGAN: Is there such a communication? The Chief Clerk might read the communication that was referred to before we act upon this amendment.

CHIEF CLERK: (A letter from Mr. Don M. Dafoe, Commissioner of Education, enclosing a statement on Section 1 of the article on health, education and welfare to the effect that he believed the statement somewhat oversimplified and setting forth seven points which he believed should be included in the constitution, was read.)

PRESIDENT EGAN: Mr. Armstrong.

ARMSTRONG: Mr. President, the Committee has asked me to speak to this section, and seeing it has been amended I hope you will liberally construe that I am talking to the amendment, but the Enabling Act that we have before us says on page 3, "The provision shall be made for the establishment and maintenance of a

system of public schools which shall be open to all children of said state and free from sectarian control." Mr. President, your Committee on Health, Education and Welfare approached this whole subject of education with great care and consideration. Many methods were sought out to provide and protect for the future of our public schools. We had to recognize that the public schools were our responsibility and that it was our duty to provide for all children of the state in matters of education. The Convention will note that in Section 1 that the Committee has kept a broad concept and has tried to keep our schools unshackled by constitutional road blocks. May I draw to your attention further the fact that we have used the words "to establish and maintain by general law". This is a clear directive to the legislature to set the machinery in motion in keeping with the constitution and whatever future needs may arise. Your Committee has also spelled out the fact that all children shall have the opportunity of schools, and that if the need arises for vocational schools, rehabilitation centers, schools for the retarded and other forms of education, that it is completely possible under this proposal. It is not only wise but mandatory under the Enabling Act to spell out that schools are operated in the public interest by the state and kept from sectarian control. In the third sentence of this section it deals with the public funds. This term was used because we felt that state funds may at times go through many hands before reaching the point of their work for the public, and so the term "public funds" was then used as a guide to every portion of our state financing, borough, city or other entity for the disbursement of these monies. In this third sentence we have used the word "direct". It was spelled out that the maintenance and operation or other features of direct help would be prohibited. This was not intended and does not prohibit the contracting or giving of services to the individual child, for that child benefits as his part of society. This section gives the education department, or other departments, the right to seek out the child, independent of his religious affiliation, to help him to become a strong and useful part of society wherein it touches health and matters of welfare. We would also point out in the light of letters that have come to this floor relevant to the disbursement of funds to denominational or other private institutions, that 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 it 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. It is the feeling of the Committee, after long work and thorough study, that these basic recommendations that we have given here on this section on education should be accepted by the Convention.

V. FISCHER: May I ask the delegate a question?

PRESIDENT EGAN: You may, Mr. Fischer, if there is no objection.

V. FISCHER: The article on finance, the proposal on finance, has the following Section 7: "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." Now, that is the article and proposal on finance which would govern not only education but all expenditures of the state, and unless there is a very special reason for having separate and different language here, we probably should treat financial matters only in the finance article, so my question to you is, is there a special reason why we should have the third sentence of Section 1 in the health, education and welfare article?

ARMSTRONG: Your Committee on Health, Education, and Welfare discussed this prior to coming to the floor this afternoon. I believe it was our unanimous feeling that this should be taken as a part of education so that it could always be clarified in relationship to this subject. We realize there are two other matters in proposals that deal directly with finance, but we felt that when we came to those things they would have to be correlated with our action at this point. I feel that this matter needs to be clarified here and that was the action of the Committee and their reason for retaining it here instead of postponing it to the finance section.

R. RIVERS: I speak directly to the proposed amendment to the section. As I understand it, or remember it after all this general discussion --

PRESIDENT EGAN: Before you proceed, it seems that some of the delegates don't realize what the proposed amendment is. After the word "direct" insert the words "or indirect". You may proceed.

R. RIVERS: The standard approach is that no public funds shall be disbursed for the direct benefit of any religious institution or parochial schools. The word "direct" is the standard treatment of that subject. Now when you get into the wording "or indirect", then you are getting into an argument as to whether you can even contract with a private institution for the rendering of certain public services because they might say they might make a profit. Now I agree that it might not be interpreted that way, but you are only stirring up an argument when

you talk about prohibiting the disbursement of money for an indirect benefit to a parochial or private institution. You are reaching clear out to ad infinitum in the realms of logic and association. You don't treat it that way, you don't stir up that kind of an argument. 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.

COGHILL: Speaking in defense of my proposed amendment, I would first like to say I am very prone to the problem of putting any religious persecution into the Constitutional Convention or among the delegates. It would be the same thing as me trying to convince Mr. Ralph Rivers of the principles of the Republican party, and he in turn of the party he belongs to. I don't believe that is the problem at all. I think that they certainly have a right, a private right or a religious right, or a parochial right under our constitution to have schools. However, I believe that the way our government was set up 175 years ago, that the founders felt that public education was necessary to bring about a form of educating the whole child for civic benefit through a division of point of the home taking a certain part of the child, the church taking a certain part of this education, and the government or state through public schools taking the other part. I adhere to that principle, and I might say that I am the president of the Association of Alaska School Boards and one of the formers of that twelve-point program we developed in Anchorage last October. I think that the problem could probably be well misconstrued here as to the motive and intent. However, I feel that the intent of public education is primarily a state function and does not belong to any private or any one particular group, whether they are in the minority or the majority. I believe we should take direct steps to maintain a free public education not encroached upon by any quarter. I think it might be well to bring out in the argument for the direct or indirect benefit of public funds for education is the matter that is now being faced in Europe and in particular in the Netherlands where they have what is called the form of educational pacification, where the government is splitting the tax dollar among some 500 different church groups providing for a parochial school benefit on an indirect basis, and in a community where there is maybe 500 school children there will be as high as seven or eight small schools scattered out throughout the community, not providing for the fullest benefit in the educational field as far as having a good complete centralized program. I think that sectarianism segregation in our educational system is bad for the children. I do not deny the right of people to have their own schools. However, I think that we should always look to the interest of the founders of our nation when they brought about the separation of church and state. The

problem was brought, and it was brought about by Thomas Jefferson quite well when he said, "If a nation expects to be ignorant and free in the state of civilization, it expects something that never shall be". Therefore out of his deliberations with John Madison they brought about a form of free public education starting in Virginia, and it has come forward ever since under the intent of having the tax dollar only brought to the public educational system. I know there have been many law cases on it, Supreme Court rulings and what not, and I think that the matter still is divided as far as the general public is concerned, as between the sects of religion and not on the principle of preserving the free public education as an instrument of the state.

RILEY: Mr. President, I should like to address a question, if I may, to the Committee Chairman, but meanwhile I wish to commend Mr. Coghill on quoting with favor, Thomas Jefferson. Miss Awes, it runs in mind and I have not the delegate proposal before me, that there was a delegate proposal submitted in language substantially the same as this would read if Mr. Coghill's amendment were adopted. Could you tell me what your experience was in Committee, what the Committee thinking was in rejecting that language?

AWES: That I believe, if I recall rightly, was Proposal No. 2 and submitted by Mr. Johnson. It was carefully considered by the Committee, and Mr. Johnson was requested to come in and speak with us on it. We considered both the words "direct" and "indirect" and we felt that the words "or indirect" would, as Mr. Rivers said, reach out into infinity practically, and probably it is not even known what the results of that might be. We did feel it would shut out certain things that should not be prohibited. For instance, the welfare department was giving certain free care to the children of the community, and it might be administered through the schools. Well, we feared that "indirect" would make it impossible to give any of these welfare benefits, for instance, to children who were in private schools, and we did not feel that any prohibition should go that far, and so the Committee did carefully consider that word and unanimously agreed we should not use it.

RILEY: It has been said the Committee gave it correct attention and rejected it permanently?

AWES: That is right.

RILEY: Thank you.

METCALF: Mr. Chairman and delegates, I very much favor the inclusion in this section of the words "or indirect". As I read the section, it refers to our school system, and in this book, "Constitutions of the States", there are 16 states that have sections in their constitutions preventing public tax dollars

from being spent for private schools in any way, shape or form. Here is the section from the State of Missouri. The constitution was drawn in 1945, which some of you may have read. It says that, "No money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister, or teacher thereof as such, and that no preference shall be given to or any discrimination be made against any church, or any form of religious faith or worship." I am a firm believer in freedom of religion, and we have been aware in the progress of history, medieval times down to colonial times, that at times there have been persecutions practiced. Those are unpleasant things and they have gone past into history. I am for the free public school system, being a licensed teacher and having taught in public school systems in the Territory. I am also a firm believer in the complete separation of church and state, especially with the use of state money and state property. As I said again, I don't believe that the state property or taxes should be used and transferred to a religious group to be used directly or indirectly to the economic or political religious detriment of some other group or individual, and all activity should be on a free and competitive basis, and if I may just have a few minutes, I have a situation in Seward where a religious group have been given the use of the building and land by the Territory, and they are in competition, economic competition to my economic detriment. It is an actual fact, and I not only speak for myself but I speak for four or five people who happen to be affected similarly, and that is why I am trying to point out that I do not like to see state property or money transferred over to religious groups because persecution often times can come about. In this instance here, they have a Territory land, building valued around 60,000 dollars, and they are in active competition with private enterprise, and they have other advantages -- free snow removal, cheap help, no taxes, and I just point out these little things here that make me very much opposed to the use of state money or property in any way, shape or form by religious groups. I therefore favor the inclusion of this phrase "or indirect".

PRESIDENT EGAN: Mr. Smith.

SMITH: Mr. President, I had the opportunity to talk rather at great length with the superintendent of schools in Ketchikan during the Christmas recess on this very subject. He had suggested that the word "indirect" be inserted here, but during the course of the conversation he also said that the public school people were desirous of providing that the standards in the parochial schools be in some manner made equal to those in the public schools. Of course, the only way that could be provided would be through supervision by the State Board of Education. I pointed out to him that the insertion of the word "indirect" here would defeat that purpose and he immediately

said that he agreed and he did not want the word "indirect" inserted.

McCUTCHEON: Mr. President, will the Chair permit a question through the Chair to Mr. Coghill?

PRESIDENT EGAN: The Chair will permit a question through the Chair to Mr. Coghill.

McCUTCHEON: Mr. Coghill, could you cite me at least a few instances how indirect benefit might accrue. Are there specific types of instances within your knowledge of how this would apply? Because of your delivery here a few moments ago I assumed that there must be various types of specific indirect benefits which you would wish to prohibit. I would like to know what they are.

COGHILL: Through the Chair to Mr. McCutcheon, I believe by putting the indirect benefit clause in there that any social welfare, health arrangements that might be made with the state with any private or parochial institution would be on a contractual basis and would be providing a service to the public and not to the institution, and that is the purpose of the indirect clause in there. It would allow them to have a contract to produce or to show full value for the value of money received from the tax coffer, from the funds. In other words, to provide a hot lunch program with Territorial money or to provide a health program in a school, I do not deny that to the private schools because I feel that that is an instrument of public benefit because the child is benefiting from it from a public standpoint, and a contractual agreement between the organization and our organized state would therefore be in effect. Does that answer your question?

McCUTCHEON: In part. Your intent would be then that if some private institution of one nature or another were to supply this particular service under contract to the state that there could be no profit in that as it extended to that institution? That is, they would have to supply that service at the actual cost? That there could be no profit derived from that particular transaction. Is that the point you are making, that it would not prohibit supplying these various types of welfare programs, hot lunches, etc., but there could not be a profit factor involved?

COGHILL: That is correct, because we in the public school system, we are not allowed to make profit on such things.

KILCHER: I think that the position is not clear at all. What Mr. McCutcheon brought up is not clear at all, a benefit is not the same as a profit, so if they don't want any profit, why don't they mention it. I can see where a private school is benefited by getting nonprofit assistance. If, for instance, it is possible

for a private school to get lunch money assistance on nonprofit basis for its children, it may make the difference for them to be able to operate or not. If they are not getting lunch money or such things, they might not be able to operate, so by getting these nonprofit assistances for the children, they are getting benefited greatly. As a matter of fact, the benefit is so great it means survival or not, so I think the issue is not clear. On the principle I think I should be against the amendment because it does not clear the issue at all in that respect.

COGHILL: Maybe to clarify a point for Mr. Kilcher, one thing we want to keep in mind is the fact that the state has set up a public educational system for all children. The people that are sending their children to private, parochial, or any other type of institution are segregating themselves fromthe public and therefore they should not derive the benefit from the tax dollar. We are providing it. We have spent thousands, hundreds of thousands to provide a good educational system, and if we go to the pacification plan, we are destroying that principle and that in turn answers your interpretation of profit or benefit.

PRESIDENT EGAN: Mr. Gray.

GRAY: If I may ask Mr. Coghill, in reference to your remarks, does your state guarantee to offer a complete educational system?

COGHILL: It certainly will, Mr. Gray, after we write the articles on the legislation.

GRAY: You feel you have a complete educational system today?

COGHILL: I certainly think so.

GRAY: I think there are a lot of areas where a lot of children have no opportunity for public education.

COGHILL: I feel that it is quite a privilege to be a part of a public educational system and be able to criticize it, to be able to criticize our methods and our procedures and to work on those. I will agree with you wholeheartedly, Mr. Gray, that there are lots of things we have to do. However, in my recent trip to Washington, D. C., and being a conferee on the White House Conference on Education, we found with the exception of one disgruntled person, we found that our educational system in Alaska was far above the educational systems of the states. We have a progressive educational system in the sense that we are moving forward. I think one of our biggest thorns is the Alaska Native Service, if that's what you are referring to.

TAYLOR: There has been a lot of sparring around here on this subject. Everybody seems to duck the issue, and I am going to

ask Mr. Coghill a question if I may, through the Chair.

PRESIDENT EGAN: You may, Mr. Taylor.

TAYLOR: Mr. Coghill, what--in the event that the word "indirect" was inserted into this measure, what effect would that have on the school bus law that is now in effect?

COGHILL: What effect would that have on the school bus law? I know I am up against a pretty good attorney, but I think that will in turn not affect too much of the school bus system in Alaska because it can be on a public work contractual basis, take it completely out of the educational picture, put it on the welfare picture.

AWES: I would like to make one statement. Mr. Coghill suggested that we insert the words "or indirect". The Committee very carefully considered that word "indirect". We were not sure of the far-reaching effects it would have. Mr. Coghill now proposes that he explains what it means. I can't agree with his interpretation in any respect, and he would have us believe from the explanation he has given so far that it means precisely nothing. I don't believe that any court would so interpret it, and I think he should either give us some reason for having it in there or else if it doesn't mean anything, then I think we should take it out, but I am not satisfied with any explanation he's given yet.

PRESIDENT EGAN: Mr. McCutcheon.

McCUTCHEON: Since the Committee considered this at considerable length about this matter of "direct" or "indirect" wording in this particular section, you must have in mind several specific instances where "indirect" might apply in some fashion in a derogatory manner. If you do have such an idea or some particular questions how this word "indirect" might affect adversely to thinking upon your particular section here, I would like to hear some of them. If your Committee has gone into this so thoroughly, there must have been one or two problems that have arisen where there would be some question about including the word "indirect".

AWES: I have already given one very good example, and that is this question of welfare services which are often administered to children through the schools. Mr. Coghill says that the word "indirect" would not prevent these. I very definitely think that the word "indirect" would prevent them. I think that is one very good example.

POULSEN: May I ask Mr. Coghill a question?

PRESIDENT EGAN: You may, Mr. Poulsen.

POULSEN: If the word "indirect" is put in, would that mean there is such a thing as subsidy to hospitals would be eliminated?

COGHILL: Mr. Poulsen, this is an educational article with the educational institution.

POULSEN: It still comes under public welfare, matching funds for instance.

COGHILL: Mr. Poulsen, if you will note that the Committee amended their proposal to have "educational" inserted before institutions, and so this is strictly an educational article, sir.

WHITE: May I direct a question to Mr. Coghill?

PRESIDENT EGAN: You may, Mr. White.

WHITE: Mr. Coghill, are there children's homes, foster homes in the Territory which provide any education at all to the children who are entitled to admission to those homes?

COGHILL: The children's homes that have schools with them, is that what you mean?

WHITE: Are there any such institutions in the Territory of Alaska that provide any education at all to the children admitted to them?

COGHILL: Yes, there is.

WHITE: What would happen to them under your proposed amendment?

COGHILL: What would happen to these institutions now operating?

WHITE: Do any of these receive any public funds either from the Federal government or the Territorial government?

COGHILL: I don't believe they do because the contract schools went out before 1900. They had a form of contract for schools and that went out. I think that all your foster homes would be deriving an indirect benefit or some sort or another, and there are plenty of them.

WHITE: I think your statement could be corrected, but I'm not the one to do it. I'll defer to someone else, but in the event it is corrected, I would like to hear your answer to the question as to what would happen to them under your amendment.

PRESIDENT EGAN: Mr. Sundborg.

SUNDBORG: I have here a copy of a memorandum from Henry A. Harmon, Director of the Department of Public Welfare of the Territory to the Attorney General on this very subject, listing

a number of schools operated by private and religious organizations to which the Territory now pays funds through the Department of Public Welfare. They show that such institutions not only include a few Catholic institutions, but also Seventh Day Adventists, Moravian, and Presbyterian. It is very brief. I wonder if I might ask to have it read.

PRESIDENT EGAN: If there is no objection the communication can be read. Mr. Fischer.

V. FISCHER: I think it should be read only if it covers educational institutions.

SUNDBORG: It does only that.

PRESIDENT EGAN: The Chief Clerk may read the communication.

(This letter giving information as to payments made by the Territory to various children's institutions in the Territory was read by the Chief Clerk.)

ARMSTRONG: Mr. President, there are several sources of income in the private institution. First of all, an institution can apply for a surplus of food, and upon the signature of the administrator, that food is made available in a limited quantity. I might give an example of butter, beans, and staples of that type. I think that is given on the basis that no Territorial agency is able to give a large enough sum to a private institution to support that child. I might give you an example of one institution that probably is receiving 900 dollars a year from the Territory, but the actual cost breakdown without new buildings and capital expenditures run in excess of 1300 dollars a year to adequately take care of that child. In that institution there was no educational facilities, that is just housing. Another source of income would be then this Territorial grant of 50 dollars which is in lieu of home care. The child as a ward of the Territory and as such must be put into a foster home or into a private institution. They choose, wherever possible, to put the child in a foster home and let that child go to the private school. If a family situation is so complicated, they want to keep that family structure together and hold that family, the child is placed in a private home. There are a few, very few of the schools that have boarding facilities and educational facilities, but there are some that exist, Mr. White, in the Territory, and most of the grants by the Territorial Department of Welfare are given for the boarding home facilities and not for the education, and I think that could be borne out by the fact that they are looking for a holding situation for the child. The educational facilities are incidental at that particular point, but there are a number of places that are together. I hope that will help.

BUCKALEW: 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 vote on it, I think they ought to understand the word "indirect" cuts out everything, just eliminates all kinds of support, and I don't think there is any question about it.

PRESIDENT EGAN: Mr. Rosswog.

ROSSWOG: Mr. Chairman, I would like to say that I cannot agree with Mr. Coghill that contracts would not be indirect help. I believe you could construe them to be indirect help. I believe that we should leave these words out of the section, and I believe the Committee has done a very good job. They have considered all angles of it, and I would like to say that I support the Committee resolution.

COGHILL: In closing the argument, I might just leave the thought with the delegates that on this particular subject of the direct or indirect benefit to the private or religious educational institution, would guarantee every citizen of the new State of Alaska that any money diverted from the public funds to any such organization in complete competition with your public institutions, if you will, that there will be a sound contractual agreement between your government and this private institution to provide public service and not to the benefit of the individual institution.

UNIDENTIFIED DELEGATE: Question.

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment.

CHIEF CLERK: "Section 1, line 7, after the word 'direct' insert the words 'or indirect'."

JOHNSON: I request a roll call.

KILCHER: I am sorry to take another minute. There is one problem that has not come up in this discussion. I am a father of seven children, five of which have had the Calvert course for several years with good results. I understand that the Calvert course could possibly be construed not to be available anymore either if indirect help were not available to a private school. The Territory pays it. My children go to a private school, or most of them. The biggest ones though hike over the road, and the Territory pays an indirect system. It could possibly be construed to include the Calvert course, which is a great problem in Alaska.

COGHILL: I might answer that, being familiar with the Calvert course, that the Territorial Department of Education, that is one of their recognized correspondence courses for the outlying areas, and if any family on a CAA remote station or someone on a remote part of the Yukon River, etc., would want to further the education of their children, write to the Commissioner of Education and they are referred to the Calvert course, and in higher institutions it would be the correspondence courses from the University of Nebraska.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Coghill be adopted by the Convention?" The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 19 - Barr, Boswell, Coghill, Collins, Cooper, Cross, Harris, Hilscher, Hinckel, Johnson, King, Knight, Laws, McCutcheon, Metcalf, Nerland, Poulsen, Robertson, Sweeney.

Nays: 34 - Armstrong, Awes, Buckalew, Davis, Doogan, Emberg, H. Fischer, V. Fischer, Gray, Hellenthal, Hermann, Hurley, Kilcher, Lee, Londborg, McLaughlin, McNealy, McNees, Marston, Nordale, Peratrovich, Reader, Riley, R. Rivers, V. Rivers, Rosswog, Smith, Stewart, Sundborg, Taylor, Walsh, White, Wien, Mr. President.

Absent: 2 - Nolan, VanderLeest.)

CHIEF CLERK: 19 yeas, 34 nays, and 2 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption.

WHITE: I have an amendment to Section 1.

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment as offered by Mr. White and Mr. Fischer.

CHIEF CLERK: "Section 1, strike the last sentence."

WHITE: I move the adoption of the amendment.

V. FISCHER: I second it.

ARMSTRONG: I object. Mr. President, I feel that we will complicate our finance situation by trying to write this into a later report for clarification. I think here in one sentence you pinpoint it; you clarify it once and for all, but when you start to define this thing again in a larger amendment, you

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ALASKA CONSTITUTIONAL CONVENTION

PART 2

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have a hopeless task. I don't think it can be done, and I believe you want it here where they read it, they understand it and they know the precepts we are following. I think we would be wasting time to now delete this after we have had this vote of confidence for the Committee's report and then try to take it up again later. So I shall vote to kill the amendment and would ask the delegates to do likewise.

WHITE: I feel again that we are getting into a legislative matter here, and I feel that the broad policies that have been laid down in the Federal Constitution are good enough for our purposes here. Those policies that are contained in our Section 5 of our bill of rights which says, "No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof". In a section, I forget the number of it, in a finance article saying that no funds shall be spent for other than a public purpose. I think those two sections are good enough to spell out the broad outline. In addition, I feel that while I am not a lawyer that almost every argument that has been applied against the use of the word "indirect" could just as logically be applied against the use of the word "direct", and I think it will lead us into trouble.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. White and Mr. Fischer be adopted"? Mr. Fischer.

V. FISCHER: I would just like to add, Mr. President, that while this Commissioner Dafoe points out education is an important field, I do not feel that when it comes to an appropriation of public funds it should receive any special, either more restrictive or more favored treatment. As Mr. White pointed out, the general stipulation is that funds be appropriated only for public purpose. Now it seems to me that the definition of public purpose must be made during every age in view of the conditions prevailing at that time. I think that has been one of the strong points of the Federal Constitution. The fact that it has left itself open to that kind of interpretation and, therefore, it seems that if we give favored treatment or discriminatory treatment to this education section, what are we going to do when it comes to health, welfare and just anything else that may come out. I think the public purpose provision should be the only guidance when it comes to appropriating public funds.

PRESIDENT EGAN: Mr. Gray.

GRAY: I would like to ask the Chairman of Style and Drafting if they would have the authority to move this section, if it directly belonged to taxation, would Style and Drafting have that authority?

PRESIDENT EGAN: Would the Rules Committee have the answer to that question?

SUNDBORG: Our rules, I believe, outline the authority of the Style and Drafting Committee and they do provide that after the various proposals have been adopted in third reading that the Style and Drafting Committee has an opportunity to arrange any material, section, subsections and I believe even sentences where it properly belongs in the constitution. It might be that Style and Drafting would have that authority, but, of course, that authority would be subject to approval here on the floor because we can't do anything in our Committee, of course, unless it is approved in a subsequent report that we make to the plenary session.

PRESIDENT EGAN: Mr. Smith.

SMITH: Mr. President, I merely wanted to point out that this problem has arisen in a good many of the States. It has arisen in connection with the education, and therefore I feel that this provision should remain in the section under education.

COGHILL: Mr. White brought up the thought that the Federal Constitution was all-inclusive. However, it might be well to remember that during the years that they were writing the Federal Constitution they left all educational matters to the individual states, and the purpose of leaving these educational matters to them was because of the trouble they were having at that time between different groups and different communities and different states being quite well controlled by different churches of one sort and another, such as the Quakers in Penn State and down in Virginia and over in Rhode Island and through that area. I feel that this should stay in the article, although my amendment did not ride, I am going to vote for it because I feel at least we have a certain provision for the direct benefit of tax dollars. I might, if I may, Mr. President, read the Supreme Court's decision of 1947 of the Emerson case, and I will not read the whole section but just in one part. It says, "No tax in any amount, large or small, can be levied to support any religious activities or institution whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither state nor federal government can openly or secretly participate in the affairs of any religious organizations or groups and vice versa."

WHITE: If I may close briefly. I am not for or against bus transportation to certain institutions. I am not for or against hot lunches to certain institutions. I again think we would be much better advised to stick to the broad outlines. In partial reply to Mr. Coghill, I might mention that 100 years from now the state might wish to get involved in some sort of G.I. Bill of its own, following another war. I would not be in favor of it now, but 100 years from now I might. Why not leave ourselves open?

BARR: Point of information. I seem to remember when we first started out there was a sheet of paper on our desk to outline certain things that was mandatory to place in our constitution to conform with the Federal Constitution and with our accepted principles of American government. I will ask Mr. Armstrong, I believe, wasn't this practically the same wording in one of those paragraphs and did it not specifically mention schools? Mr. White has put in his amendment because he said the other phrasing in the Finance Committee report would take care of it. That mentioned public funds should be used for public purposes, but aren't we required to state in our constitution that public funds should not be used for private schools?

ARMSTRONG: No sir, not according to the House Enabling Act that we have used as a guide. On page 3, line 14, it just makes the general provision that for the establishment and the maintenance of a system of public schools which shall be open to all children of the state and free from sectarian control. That is the only thing, but I might add that I believe that there are 39 states that have added some type of safeguard in their constitutions directly in connection with education, and I believe every new constitution that has come out has held to some provision of this type, practically in every case they have been written in at this point, so I don't know why we should be afraid to follow that pattern. I don't think it is unusual to keep it here. I think it is healthy to keep it here, and I believe this is where it belongs.

McNEES: I call for the question.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. White and Mr. Fischer be adopted by the Convention?"

JOHNSON: I request a roll call.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 13 - V. Fischer, Hurley, Kilcher, Laws, Lee, McCutcheon, Nolan, Poulsen, Reader, Riley, Sundborg, Walsh, White.

Nays: 41 - Armstrong, Awes, Barr, Boswell, Buckalew, Coghill, Collins, Cooper, Cross, Davis, Doogan, Emberg, H. Fischer, Gray, Harris, Hellenthal, Hermann, Hilscher, Hinckel, Johnson, King, Knight, Londborg, McLaughlin, McNealy, McNees, Marston, Metcalf, Nerland, Nordale, Peratrovich, R. Rivers, V. Rivers, Robertson, Rosswog, Smith, Stewart, Sweeney, Taylor, Wien, Mr. President.

Absent: 1 - VanderLeest.)

CHIEF CLERK: 13 yeas, 41 nays and 1 absent.

PRESIDENT EGAN: The "nays" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 1? Mr. Victor Rivers.

V. RIVERS: May I ask a question? I notice that the Committee has come in with the words "direct benefit". I notice that some of the other states' constitutions, including that of Hawaii, say "support or benefit". What was the intent of limiting them to the word "direct"? I would like to know a little about the intent of the Committee rather than in dealing with both "support" or "benefit".

PRESIDENT EGAN: Miss Awes.

AWES: I don't recall that the Committee considered the words "support" or "benefit". I think the purpose we wanted to achieve was brought out in the arguments on an earlier amendment and we felt these words did it, and I don't recall the words "support" or "benefit" came before the Committee.

V. RIVERS: In other words, the Committee did not consider the words "support" or "benefit"?

AWES: That is right.

PRESIDENT EGAN: That seems to be the understanding of the Chair. Mr. Armstrong.

ARMSTRONG: As I recall, Mr. President, we probably discussed the question of the support of private schools, 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 a 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 for building or maintenance of private institutions.

V. RIVERS: Mr. President, I am going to make a motion. I think that the word "direct" limits the interpretation of this. I am going to make a motion that the word "direct" be stricken and insert in lieu thereof the words "support of", line 7.

BARR: I second it.

PRESIDENT EGAN: The matter is open for discussion. Mr. Rosswog.

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Court's ruling won't end all voucher issues

Apr 6, 2011|

The U.S. Supreme Court decision issued Monday gives us a glimpse into how school voucher programs in Indiana -- and other states -- might one day look.

Tax-credited contributions made to an Arizona scholarship organization that provides tuition scholarships to secular and religious schools can not be sued for violating the establishment clause, the court ruled Monday.

The court ruled in 2002 that school vouchers, even those that went to religious schools, do not violate the First Amendment clause often referred to as separation of church and state.

So as far as the U.S. law is concerned, school vouchers for parochial schools and tax-credited scholarship contributions that might fund students' tuition at religious-based schools are kosher.

But state laws are a different matter, and one shouldn't expect school voucher issues to be settled or go unchallenged in Indiana or in other states grappling with education reforms.

House Democrats' six-week walkout failed to stop House Bill 1003, the school voucher bill, which continues to wind its way through the General Assembly.

Proponents and opponents of House Bill 1003 speculate how it will change Indiana public and private schools for the better or worse. But in reality, House Bill 1003 is not likely the panacea proponents tout it to be, and it's not the nail in public education's coffin that opponents claim. But it is a potential game changer for both public and private institutions.

If it becomes law, school vouchers will influence how Hoosier children are educated. And since no bill is perfect, the voucher system would likely need tweaking in years to come.

While acknowledging Indiana's education system needs reform, we've not been quick to jump on the school voucher bandwagon -- nor are we doing that today. There are too many questions left unanswered. But it appears the Republican-controlled General Assembly is bent on making school vouchers the law.

If school vouchers are approved, Hoosiers should expect lengthy legal challenges, including whether vouchers comply with Indiana's Constitution. If the U.S. Supreme Court is any indicator, it is likely school vouchers are not the constitutional aberration some paint them to be. If this is the case, the question is whether they are as effective as some claim they are. That remains unknown as of now.

When these cases are inevitably filed, people are likely to barricade themselves behind tired arguments. In the rush to defend their positions, we hope both sides remember that the status quo in education is not working in Indiana -- or anywhere else. To find what might work requires change, and change is never easy to entrenched institutions.

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Court ruling on school money stirs voucher bill debate

By: MIKEL LIVINGSTON mlivingston@jconline.com 8:30 PM, Apr. 5, 2011|

U.S. Supreme Court ruling this week is already stirring debate on possible ramifications of controversial legislation that would create a school voucher program in Indiana.

On Monday the Supreme Court ruled 5-4 that ordinary taxpayers cannot challenge government programs that use tax breaks to direct money to religious activities. The ruling was directed at an Arizona scholarship program that has mainly benefited religious schools through tax breaks.

Opponents of private school vouchers, including those promoted by Indiana House Bill 1003, fear the ruling will make it more difficult to use federal courts to claim violations of the Constitution's prohibition on direct government aid to religion.

Chris McGrew, a former consultant for the Indiana Department of Education and former board member for the Indiana Coalition for Public Education, said the ruling will "embolden" and "empower" voucher supporters.

Arizona's program has allowed residents to send up to $500 to a tuition scholarship organization that they would have otherwise paid the state in taxes on their incomes, the bulk of which has gone to private religious schools.

Justice Anthony Kennedy wrote the Supreme Court's majority opinion, saying that because the program operates as a tax credit, instead of a direct appropriation of government money, "contributions result from the decisions of private taxpayers regarding their own funds."

Justice Elena Kagan, who voted against the ruling, predicted lawmakers elsewhere would adopt the "road map" Kennedy provided to subsidize religion without facing judicial review.

But McGrew said differing details in the bill will give some legal leverage.

"Constitutionally the ruling in Arizona is different enough, (the Indiana program) will come before the courts," McGrew said. "I just hate that taxpayers and our schools and students are going to have to pay for it."

Last week, Indiana House Democrats failed with an amendment that would have limited the vouchers to only students attending failing schools.

That amendment was defeated and the bill passed, moving to the Senate. The bill will be discussed by the Senate Education and Career Development Committee later today.

If passed in its current form, Indiana's scholarship program would not be limited to lower-income families, special need students or students in failing schools, making it the broadest voucher program in the nation. The program would be open for families earning up to $60,000 a year and within three years there would be no limit on the number of children who could enroll.

William McLauchlan, a Purdue University associate professor, has written extensively on the Indiana state constitution and the judicial behavior of Supreme Court justices. He said he believes Indiana's voucher bill violates both the state and federal constitutions.

McLauchlan said it's a near guarantee the voucher bill will be protested in court if passed, and he anticipates the Indiana Supreme Court would rule against it.

"I can't imagine, if it is a raw use of public funds for a system that supports private educational institutions, that it will stand the test, but there's no telling for sure," McLauchlan said.

Some private school leaders have also expressed reservations about the plan, but for different reasons.

Lafayette Christian School Principal Ken Goff said he and his staff are waiting for more specifics on the proposal before forming an opinion.

"We are still mixed on it," Goff said. "There are still a lot of details not specified yet. We want to make sure we can remain a private Christian school as we are."

Goff said maintaining the independence of a private school remains paramount.

"We're accredited by the state, so we take ISTEPs and we're accountable with that, but we do have some freedom as we are a private school," Goff said. "We just want to be sure if we accept (vouchers) we can keep that autonomy."

Monday's ruling and a 2002 decision that upheld the use of vouchers "should give state legislatures wide discretion in adopting school choice programs," said Tim Keller, executive director of the Arizona chapter of the Institute for Justice. The group represented both religious and secular scholarship organizations that receive the tax money.

"School choice programs are not about aiding religion," Keller said. "They're aimed at helping individual families."

Contributing: Associated Press

Michelle Rhee on D.C. Kids' 'Crappy Education'

Firebrand Schools Chancellor Michelle Rhee, the National Face for Education Reform, Could Lose Her Job

By Z. BYRON WOLF and LEE FERRAN

Sept. 16, 2010

"They are getting a crappy education," Rhee said while discussing the district's schoolchildren in an interview with ABC News. "I mean, you could try to sugar coat it all you want. Subpar, or whatever. But what it is in terms that everyone can understand -- they are getting a crappy education."

It could be comments like that, not to mention aggressive and controversial education policies, landed Rhee in the spotlight of a new documentary "Waiting for Superman," and could also cost her her job.

Rhee, who has become the national face of education reform, could end up jobless after D.C. voters ousted Mayor Adrian Fenty.

Under Rhee's three-year watch, more than 200 teachers have been fired, nearly 20 schools closed and pay has been tied to merit evaluations. But test scores have shot up for elementary and secondary school students, and teachers' salaries were raised.

"The situation we inherited three years ago in Washington, D.C., was absolutely deplorable," Rhee said. "People need to understand that and if that makes people uncomfortable, then so be it."

The victor in Tuesday's Democratic primary -- and therefore almost a sure winner come November in this overwhelmingly Democratic city -- is City Council Chairman Vincent Gray, a chief Rhee antagonist at oversight hearings.

Gray has not said he would fire Rhee, but he hasn't said he would keep her on either.

"I have said on many occasions that after this election is over, I'd like to sit down with Michelle Rhee and let us walk and talk through it, you know, how we might work together," Gray said on CNN Tuesday.

Rhee had campaigned for Fenty. The Washington Teacher's Union campaigned for Gray.

"This has been a significant change in direction and it's going to require me sitting down with Mayor Fenty, the chairman and other people to see what's in the best interests of our kids," Rhee said Wednesday in an interview with MSNBC.

Rhee Feels Guilty About Fenty Loss

"I do feel sort of bad and guilty," she said. "This man, Adrian Fenty, is truly the best leader I've ever worked for. We need more leaders like him who are willing to stake everything to make sure our kids are getting a good education."

Obviously, D.C. voters disagree. And so do the leaders of local and national teachers unions.

An op-ed Wednesday morning by George Parker, president of the Washington Teacher's Union, and Randi Weingarten, president of the American Federation of Teachers, made no mention of Rhee. The article was titled "No Turning Back for D.C. Kids," and it suggested that the teachers would be happier and work more collaboratively with Gray.

"Public education is a marathon, not a sprint. Yes, there's urgency to fixing our schools, but we have to set ourselves on a long-term path toward constant and sustainable progress," wrote the union leaders.

President Obama stayed out of the race, but Secretary of Education Arne Duncan appeared at an event with Fenty and Rhee in the closing days of the election. It was not a campaign event, but Duncan announced the award of $75 million in new federal funding for D.C. schools. He was noticeably absent from any event with Gray.

Wednesday, Nov. 26, 2008

Rhee Tackles Classroom Challenge

By Amanda Ripley / Washington

In 11th grade, Allante Rhodes spent 50 minutes a day in a Microsoft Word class at Anacostia Senior High School in Washington. He was determined to go to college, and he figured that knowing Word was a prerequisite. But on a good day, only six of the school's 14 computers worked. He never knew which ones until he sat down and searched for a flicker of life on the screen. "It was like Russian roulette," says Rhodes, a tall young man with an older man's steady gaze. If he picked the wrong computer, the teacher would give him a handout. He would spend the rest of the period learning to use Microsoft Word with a pencil and paper.

One day last fall, tired of this absurdity, Rhodes e-mailed Michelle Rhee, the new, bold-talking chancellor running the District of Columbia Public Schools system. His teacher had given him the address, which was on the chancellor's home page. He was nervous when he hit SEND, but the words were reasonable. "Computers are slowly becoming something that we use every day," he wrote. "And learning how to use them is a major factor in our lives. So I'm just bringing this to your attention." He didn't expect to hear back. Rhee answered the same day. It was the beginning of an unusual relationship.

The U.S. spends more per pupil on elementary and high school education than most developed nations. Yet it is behind most of them in the math and science abilities of its children. Young Americans today are less likely than their parents were to finish high school. This is an issue that is warping the nation's economy and security, and the causes are not as mysterious as they seem. The biggest problem with U.S. public schools is ineffective teaching, according to decades of research. And Washington, which spends more money per pupil than the vast majority of large districts, is the problem writ extreme, a laboratory that failure made. (See pictures of a diverse group of American teens.)

Rhee took over Anacostia High and the district's 143 other schools in June 2007, when Mayor Adrian Fenty named her chancellor. Her appointment stunned the city. Rhee, then 37, had no experience running a school, let alone a district with 46,000 students that ranks last in math among 11 urban school systems. When Fenty called her, she was running a nonprofit called the New Teacher Project, which helps schools recruit good teachers. Most problematic of all, Rhee is not from Washington. She is from Ohio, and she is Korean American in a majority-African-American city. "I was," she says now, "the worst pick on the face of the earth."

But Rhee came highly recommended by another prominent school reformer: Joel Klein, chancellor of New York City's schools. And Rhee was once a teacher--in a Baltimore elementary school with Teach for America--and the experience convinced her that good teachers could alter the lives of kids like Rhodes.

Anacostia High has a 24% graduation rate, and only 21% of its students read at grade level. Rhodes is well aware of the miserable statistics, and when he first saw his new chancellor from afar, he thought she looked petite, foreign and underqualified. "I was like, She doesn't look ready for urban kids." But after they exchanged e-mails, he agreed to meet her downtown. He realized almost at once that he had underestimated her. "She actually sat

with me," he says, "and talked eye to eye, like I was one of her co-workers." They decided to meet again, this time at Anacostia High. Rhodes began to talk about Rhee to his classmates, and they started writing an agenda for the meeting, detailing all the things that were wrong with the D.C. school system. They had much to tell.

Rhee has promised to make Washington the highest-performing urban school district in the nation, a prospect that, if realized, could transform the way schools across the country are run. She is attempting to do this through a relentless focus on finding--and rewarding--strong teachers, purging incompetent ones and weakening the tenure system that keeps bad teachers in the classroom. This fall, Rhee was asked to meet with both presidential campaigns to discuss school reform. In the last debate, each candidate tried to claim her as his own, with Barack Obama calling her a "wonderful new superintendent."

Hard as it is to imagine Washington schools ranking among the best in the country, the city does have some things working in its favor. The system is relatively small, making it easier to redirect. As in New York City, the board of education was recently dissolved, which means changes can be made without waiting for the blessing of a fractious body of overseers. And now that a third of Washington's kids are in charter schools, there is intense pressure on the public system to keep the students it still has. If they keep fleeing the system at the current rate, enrollment will drop 50% every 10 years.

Each week, Rhee gets e-mails from superintendents in other cities. They understand that if she succeeds, Rhee could do something no one has done before: she could prove that low-income urban kids can catch up with kids in the suburbs. The radicalism of this idea cannot be overstated. Now, without proof that cities can revolutionize their worst schools, there is always a fine excuse. Superintendents, parents and teachers in urban school districts lament systemic problems they cannot control: poverty, hunger, violence and negligent parents. They bicker over small improvements such as class size and curriculum, like diplomats touring a refugee camp and talking about the need for nicer curtains. To the extent they intervene at all, politicians respond by either throwing more money at the problem (if they're on the left) or making it easier for some parents to send their kids to private schools (if they're on the right).

Meanwhile, millions of students left behind in confused classrooms spend another day learning nothing.

See pictures of eighth-graders being recruited for college basketball.

See TIME's special report on paying for college.

A Teacher from Toledo

ONE DAY IN AUGUST, I SPENT THE MORNING with Rhee as she made surprise visits to Washington public schools. She emerged from her chauffeured black SUV with two BlackBerrys and a cell phone and began walking--fast--toward the front door of the first school. She wore a black pencil skirt, a delicate cream blouse and strappy high heels. When we got inside, she walked into the first classroom she could find and stood to the side, frowning like a specter. When a teacher stopped lecturing to greet her, she motioned for the teacher to continue. Rhee smiled only when students smiled at her first. Within two minutes, she had seen enough, and she stalked out to the next classroom.

In the hallway, she muttered about teachers who spend too much time cutting out elaborate bulletin-board decorations or chitchatting at "morning meetings" with their third-graders before the real work begins. "We're in Washington, D.C., in the nation's capital," she said later. "And yet the children of this city receive an education that every single citizen in this country should be embarrassed by." (See pictures of teens and how they would vote.)

In the year and a half she's been on the job, Rhee has made more changes than most school leaders--even reform-minded ones--make in five years. She has shut 21 schools--15% of the city's total--and fired more than 100 workers from the district's famously bloated 900-person central bureaucracy. She has dismissed 270 teachers. And last spring she removed 36 principals, including the head of the elementary school her two daughters attend in an affluent northwest-D.C. neighborhood.

Rhee is convinced that the answer to the U.S.'s education catastrophe is talent, in the form of outstanding teachers and principals. She wants to make Washington teachers the highest paid in the country, and in exchange she wants to get rid of the weakest teachers. Where she and the teachers' union disagree most is on her ability to measure the quality of teachers. Like about half the states, Washington is now tracking whether students' test scores improve over time under a given teacher. Rhee wants to use that data to decide who gets paid more--and, in combination with classroom evaluation, who keeps the job. But many teachers do not trust her to do this fairly, and the union bristles at the idea of giving up tenure, the exceptional job security that teachers enjoy.

Rhee grew up in a nice neighborhood in Toledo, Ohio, a middle child, between two brothers. Her parents immigrated from South Korea several years before she was born so that her father could study medicine at the University of Michigan. He became a specialist in rehabilitation and pain medicine, and her mother owned a women's clothing store. Education was highly valued in the family, as was independence. After Rhee finished sixth grade, her parents sent her to South Korea to live with an aunt and attend a Korean school, a harrowing experience for a child in a strange land with limited skills in its language. When she returned a year later, her parents sent her to a private school because they found the public schools lacking.

After Rhee graduated from Cornell University in 1992, she joined Teach for America. She spent three years teaching at Harlem Park Elementary, one of the lowest-performing schools in Baltimore. Her parents visited and were stunned by the conditions of the neighborhood. "The area where the kids lived reminded me of a scene after the Korean War," says her father Shang Rhee.

Rhee suffered during that first year, and so did her students. She could not control the class. Her father remembers her returning home to visit and telling him she didn't want to go back. She had hives on her face from the stress.

The second year, Rhee got better. She and another teacher started out with second-graders who were scoring in the bottom percentile on standardized tests. They held on to those kids for two years, and by the end of third grade, the majority were at or above grade level, she says. (Baltimore does not have good test data going back that far, a problem that plagues many districts, so this assertion cannot be checked. But Rhee's principal at the time has confirmed the claim.) The experience gave Rhee faith in the power of good teaching. Yet what happened afterward broke her heart. "What was most disappointing was to watch these kids go off into the fourth grade and just lose everything," Rhee says, "because they were in classrooms with teachers who weren't engaging them."

The summer after her second year of teaching, Rhee met Kevin Huffman, a fellow Teach for America member. They married two years later and had two daughters, Starr and Olivia, now 9 and 6. They moved to Colorado to be closer to Rhee's parents, but the marriage faltered. Huffman and Rhee separated, agreeing to joint custody of the kids. And then Rhee got the offer to run Washington's schools. Huffman, now head of public affairs for Teach for America, had no illusions about the challenges Rhee would face. But when he heard about

the job offer, he decided to follow her to D.C. "Even though moving didn't sound like a whole lot of fun," he says, "the reality is that I genuinely believed that she had the potential to be the best superintendent in the country. Most people think about their own longevity, about political considerations." He adds, "Very few people genuinely don't care about anything other than the end result for kids. Michelle will compromise with no one when it comes to making sure kids get what they deserve."

Scorched Earth

WHEN THEY ARRIVED IN WASHINGTON, Huffman and Rhee anted up. They enrolled Starr and Olivia in Oyster-Adams, a public elementary school. Although the school is considered among the best in the city, Rhee quickly concluded that it was inferior to the Colorado public school her daughters had been attending. Among other things, the homework was sporadic and unchallenging, she says. Rhee dismissed the principal before the school year was out, a move that sparked outrage across the city and in her own home. "That," she says, "was probably the decision I got the most grief about."

Rhee is, as a rule, far nicer to students than to most adults. In many private encounters with officials, bureaucrats and even fundraisers--who have committed millions of dollars to help her reform the schools--she doesn't smile or nod or do any of the things most people do to put others at ease. She reads her BlackBerry when people talk to her. I have seen her walk out of small meetings held for her benefit without a word of explanation. She says things most superintendents would not. "The thing that kills me about education is that it's so touchy-feely," she tells me one afternoon in her office. Then she raises her chin and does what I come to recognize as her standard imitation of people she doesn't respect. Sometimes she uses this voice to imitate teachers; other times, politicians or parents. Never students. "People say, 'Well, you know, test scores don't take into account creativity and the love of learning,'" she says with a drippy, grating voice, lowering her eyelids halfway. Then she snaps back to herself. "I'm like, 'You know what? I don't give a crap.' Don't get me wrong. Creativity is good and whatever. But if the children don't know how to read, I don't care how creative you are. You're not doing your job."

See pictures of a diverse group of American teens.

See pictures of the college dorm's evolution.

Rhee's ferocity has alienated many people--even those who support her ideas and could be helpful to her. This summer the chair of the Washington city council called dealing with Rhee a "nightmare." There has been talk of passing legislation to rein her in. "Michelle Rhee believes in scorched earth," says Randi Weingarten, president of the American Federation of Teachers, a national union that has become unusually involved in local matters in Washington. "I am not saying that D.C.'s school system doesn't need a lot of help. But I have been part of a lot of reforms, and the one thing I have never seen work is a hierarchical, top-down model."

Rhee is aware of the criticism, but she suggests that a certain ruthlessness is required. "Have I rubbed some people the wrong way? Definitely. If I changed my style, I might make people a little more comfortable," she says. "But I think there's real danger in acting in a way that makes adults feel better. Because where does that stop?"

The Data

ON RHEE'S TOUR OF SCHOOLS DURING the first week of classes this year, a parent stopped her to praise her accomplishments so far. Rhee listened with a small smile while systematically cracking each of her knuckles with the thumb of the same hand. Then she got back into her SUV and began furiously e-mailing. When she calls her staff, she does not say hello; she just starts talking. She answered 95,000 e-mails last year, according to her office.

She frequently sounds exasperated. "People come to me all the time and say, 'Why did you fire this person?'" she says. The whiny voice is back. "'She's a good person. She's a nice person.' I'm like, 'O.K., go tell her to work at the post office.' Just because you're a nice person and you mean well does not mean you have a right to a job in this district."

The data back up Rhee's obsession with teaching. If two average 8-year-olds are assigned to different teachers, one who is strong and one who is weak, the children's lives can diverge in just a few years, according to research pioneered by Eric Hanushek at Stanford. The child with the effective teacher, the kind who ranks among the top 15% of all teachers, will be scoring well above grade level on standardized tests by the time she is 11. The other child will be a year and a half below grade level--and by then it will take a teacher who works with the child after school and on weekends to undo the compounded damage. In other words, the child will probably never catch up.

The ability to improve test scores is clearly not the only sign of a good teacher. But it is a relatively objective measure in an industry with precious few. And in schools where kids are struggling to read and subtract, it is a prerequisite for getting anything else done. In their defense, Washington teachers and principals, like educators in many of the country's worst school districts, talk about trying to teach a seventh-grader who is eight months pregnant; about being assaulted by students; about holding meetings for parents, replete with free food, and no one showing up. Washington Teachers' Union leader George Parker worries that test-score data cannot take all this into account: "I don't think our teachers are afraid of demonstrating student growth, but you have to look at the dynamics of the children you're dealing with. If I'm teaching children who have computers at home, who have educated parents, those students can move a lot faster than kids whose parents can't read."

Rhee says she does not expect all kids to move up the charts at the same rate; the important thing is to demand that most do move up. "This is a cultural shift," says Kaya Henderson, Rhee's deputy. "For years, there were no data, and you were a good teacher because the parents or your principal told you so. And so this is a scary thing."

The most glaring example of the backward logic of schools is the way most teachers receive lifetime job security after one or two years of work. As Larry Rosenstock, CEO of eight California charter schools, noted at an education panel last spring, we don't give that kind of job security to pilots or doctors--or any others who hold our children's fate in their hands: "What is it that is so exceptional about teachers that they should have this unique right?"

Teachers got tenure rights in the early 20th century to protect them against meddling politicians and school-board members who treated their jobs as patronage pawns. But the rationale is plainly antiquated. Today dozens of federal and state laws protect teachers (and other people) from arbitrary firing. But most teachers still receive tenure almost automatically. In fact, even before they get tenure, they are rarely let go. Schools spend millions of dollars evaluating teachers, but principals have little incentive to shake up their staffs, and so most teachers end up scoring near the top. "What I'm finding is that our principals are ridiculously--like ridiculously--conflict-averse," Rhee says. "They know someone is not so good, and they want to give him a 'Meets expectations' anyway because they don't want to deal with the person coming into the office and yelling and getting the parents riled up."

Right now, schools assess teachers before they teach--filtering for candidates who are certified, who have a master's degree, who have other pieces of paper that do not predict good teaching. And we pay them the same regardless of their effectiveness.

By comparison, if we wanted to have truly great teachers in our schools, we would assess them after their second year of teaching, when we could identify very strong and very weak performers, according to years of research. Great teachers are in total control. They have clear expectations and rules, and they are consistent with rewards and punishments. Most of all, they are in a hurry. They never feel that there is enough time in the day. They quiz kids on their multiplication tables while they walk to lunch. And they don't give up on their worst students, even when any normal person would.

See pictures of teens and how they would vote.

See pictures of college mascots.

Students know this instinctively. Acquirra Carter, 14, attends Washington's Cardozo High School, where, she complains, kids walk out of classes when they get bored and certain teachers talk on their cell phones when they are supposed to be teaching. But there are exceptions, and Carter knows them when she sees them. "Some teachers find a way. Mrs. Brown, they would not dare walk out of her class. She has total control. Mrs. Lawton, nobody leaves her class. This boy whispered, and she knew it!"

Minefields in the Schoolyard

IN THE VIEW OF RHEE AND REFORMERS like her, the struggle to fix America's failing school system comes down to a simple question: How do you get the best teachers and principals to work in the worst schools? In her quest to figure this out, Rhee has already suffered a major setback. Earlier this year, she proposed a revolutionary new model to let teachers choose between two pay scales. They could make up to $130,000 in merit pay on the basis of their effectiveness--in exchange for giving up tenure for one year. Or they could keep tenure and accept a smaller raise. (Currently, the average teacher's salary in Washington is $65,902.) The proposal divided the city's teachers into raging, blogging factions. This fall, the union declined to put Rhee's proposal to a vote, and its relationship with her has become increasingly hostile.

In October, Rhee vowed to purge incompetent teachers through any means necessary. She has brought on extra staff to help principals navigate the byzantine termination process and says an unprecedented number of teachers have already been put on notice. But she cannot give teachers the huge raises she proposed unless the union agrees to a new contract. So this approach will be slower, more litigious and less inspiring. In other words, it will be all stick and no carrot. It's hard to say if anyone else would have been able to persuade the union to trade away tenure for cash bonuses, but Rhee's sometimes dismissive attitude made it harder for some teachers to trust her.

For now, Mayor Fenty says he still has full confidence in Rhee, and he claims that Washington residents share his enthusiasm. "Regular people love the fact that for once someone is making tough decisions for D.C. schools," says Fenty, who attended the district's public schools. But the disconnect between Rhee's confident, sweeping rhetoric and the tortured reality is sizable, and it is most apparent at ground level, in the schools she is trying to save.

Rhee likes to tell the story of how Rhodes got in touch with her. She recounted it on TV on The Charlie Rose Show in July: "A student sent me this e-mail and said, basically, If you really want to know what's wrong with our schools, you should come and talk to the kids because I'm afraid that by talking to the adults, you might not be getting the real story."

Rhodes has a more nuanced version of the story. After their initial meeting, they met for a second time at Anacostia High, in a room off the library. Rhodes had invited eight fellow students, and they gave Rhee their typed agenda. They talked about the need for better teachers, as Rhee emphasizes when she tells the story. But Rhodes says he also told her about the holes in the floors, the lack of supplies and the fact that most classes did not have enough books for the students to take home. Rhee listened but did not offer many specific solutions. "She was vague," Rhodes says. "I got the sense she didn't want to make promises she couldn't keep."

Then one day last May, Rhee dismissed Anacostia's principal. Rhodes was devastated. He sent Rhee a furious e-mail. "My principal is a mother, mentor and a teacher to us all," he wrote. "I refuse, NO! we refuse the students of Anacostia to let her go." Rhee wrote him back. "She told me not to worry about it," Rhodes says quietly.

One of the things that make school reform so wrenching and slow is that schools become embedded in people's hearts. This is true in rich neighborhoods and poor ones, with good

schools and bad. Rhodes talks about his school as if it were an extension of himself. He talks about "my teachers" and "my staff," and he refers to other students as "my colleagues." "I love Anacostia High School," he says. At the same time, he is dismayed by his school. He walks through his halls, pointing out the litter on the floor and the broken lockers. Rhodes is 6 ft. 8 in. (2 m) tall, so he has to look down to talk to almost everyone. He wears white tube socks under his black Nike flip-flops and carries his large frame deliberately, like a gentle overseer. "You see all these lockers? None of them work," he says. "This classroom over here is supposed to be for home economics, but it's never been fixed up."

Rhodes did not contact Rhee again. This year Anacostia has a new principal, and Rhodes admits that the school is functioning better. "All the children are wearing their uniforms," he says. "No kids are in the hallways." If you come to school without your uniform on, a security guard or an assistant principal will "snatch you up and just send you home." All the computers in his Microsoft Word classroom now work.

But on Nov. 19, Rhodes had to evacuate his school when fights broke out in the hallways and three students were stabbed. And he still doesn't use the school bathrooms, which are filthy and sometimes unsafe. He waits until he returns to his grandmother's house, where he lives.

Now that he is a senior, Rhodes spends much of his time worrying about getting into college. As we stand on the front steps of the school one autumn evening after class, I ask him what he wants to study. He answers quickly: "Public administration, with a minor in English." I ask him how he can be so sure. "Because someone told me that's what I have to do to take Chancellor Rhee's job," he says matter-of-factly, watching his drum corps practice and his baton twirlers twirl in the twilight.

LEGAL SERVICES

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MEMORANDUM December 1, 2010

SUBJECT: Education Vouchers as Scholarships
(Work Order No. 27-LS0223\A)

TO: Representative Wes Keller
Attn: Jim Pound

FROM: Jean M. Mischel
Legislative Counsel

I have enclosed a draft version of an education voucher system based generally on the material provided, accommodating your desire to avoid a significant rewrite of the current funding system for public education and to base the draft on the "mission statement" rather than the model legislation provided. I tried to condense the proposal to that end but received no specific staff direction in doing so. The time allotted in your request does not allow for rewrites.

Although this proposal is unlike your previous education voucher request this session in that this draft attempts to provide vouchers as scholarships for use at both public and private schools, it is my opinion that the draft will not survive Alaska's express constitutional prohibition against providing public funds for the benefit of a private school under article VII, section 1. That section provides, in part:

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

The Alaska Supreme Court has interpreted that section to mean that a tuition assistance program awarding students attending private colleges an amount equal to the difference between public and private college tuition is unconstitutional. Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979).

Sheldon Jackson is directly relevant to the proposed scholarship system. In that case, the Court established a three part test for determining the validity of public programs that provide economic benefit to private schools. First, the Court looks at the breadth of the class to which the economic benefits are directed. Second, the Court looks at how the public money is to be used; i.e., whether the benefit to the private school is incidental to education (as with fire and police protection) or whether it amounts to direct aid to education (as with tuition and books). Third, the Court looks at the magnitude of the benefit to private education. Significantly, the Court noted that channeling funds to a

private school through an intermediary (such as the student or parent) will not save an otherwise unconstitutional program providing aid to private schools.

In the Sheldon Jackson case, the Court struck down the state's tuition assistance program as violative of all three parts of the test. The class which the tuition assistance program benefitted consisted almost entirely of private schools, the funds were to be used directly for educational purposes (tuition), the benefit conferred on these schools was quite substantial, and the fact that the money was actually paid directly to the students, not the schools, did not mitigate the fact that the students were required to turn the money directly over to the private schools.

The proposed "scholarship" system (which appears to be a voucher system) suffers some of the same infirmities as the tuition assistance program did despite the inclusion of public schools. The money would go to private schools or public schools for the cost of education and facilities. A large part of the class benefitted would be private schools since the public schools currently receive public funding.

The second part of the test would also be violated because the vouchers would be used as a direct benefit to private education rather than an incidental benefit.

The third part of the test, the magnitude of the benefit, also presents a problem. The vouchers are to cover the entire cost of tuition or the cost of tuition plus the facilities spending. Obviously, the benefit to private schools would be substantial and, consequently, unconstitutional.

The proposed scholarship system is also potentially in violation of the "establishment" and "freedom of religion" clauses of article I, section 4 of the Constitution of the State of Alaska. I am aware that voucher systems in Wisconsin and Ohio have survived constitutional challenge under the U.S. First Amendment. See Zelman v. Simmon - Harris 536 U.S. 639 (2002). However, that does not mean scholarships would be upheld under art. I, section 4 of the state constitution. In addition, the Court in Sheldon Jackson noted that First Amendment cases upholding limited forms of assistance to religious schools have no relevance to the preceding analysis of article VII, section 1 of the state constitution. The prohibition against state aid to any private school is much broader than the prohibition under the First Amendment which relates only to religious schools. For example, the United States Supreme Court case upholding a Minnesota program of tax credits for public and private school expenses against a First Amendment challenge (Mueller v. Allen, 463 U.S. 388 (1983)) is not relevant to the analysis of the proposed voucher system in Alaska. Not only did that case involve a tax credit system rather than a voucher system, but it was challenged under the First Amendment. The case did not consider the kind of prohibition against direct aid to private schools found in the Alaska constitution. In other words, even if the scholarship system could survive scrutiny under the First Amendment, it would still violate article VII, section 1 of the state constitution.

In order to survive constitutional scrutiny under the state constitution, a voucher system, such as the proposed parental choice scholarship system, would have to satisfy all three parts of the Sheldon Jackson test and scrutiny under the First Amendment. It is difficult to imagine a voucher system, as I understand the voucher system to work, that would not violate the constitution. The system would have to benefit students in public as well as private schools without giving any substantial direct benefit to education in the private schools. By its nature, the voucher system seems to work against this.

The problem could be circumvented by amending article VII, section 1 of the state constitution as you have proposed in a separate draft resolution.

In addition to constitutional considerations, this draft leaves many unanswered and potentially very expensive questions. For example, do you really intend to make a home district pay transportation costs? How is the student count and scholarship funding affected if a student transfers midyear? How does a public school district which is paid under the existing formula (AS 14.17) account for direct scholarship payments to schools? The material provides no direction on these and other questions that arise under Alaska law.

If I may be of further assistance, please feel free to contact me.

JMM:ljw
10-436.ljw

Enclosure

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

Supreme Court of Alaska
599 P.2d 127;1979 Alas. LEXIS 552
Nos. 3978, 4002
August 28, 1979

Editorial Information: Prior History

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Thomas B. Stewart, Judge.

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

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

Ronald W. Lorensen, Assistant Attorney General, Avrum M. Gross, Attorney General, Juneau, for Appellee.

Robert C. Erwin, Sanford M. Gibbs, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for Amicus Curiae Catholic Bishop of Northern Alaska.

Judges: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant private universities challenged a decision of the Superior Court of the State of Alaska, First Judicial District, Juneau, which granted summary judgment in favor of appellee, the State of Alaska, and held that Alaska's tuition grant program, Alaska Stat. 14.40.751-.806, violated Alaska Const. art. VII, 1. The private universities had filed an action challenging the termination of the program.Tuition grant program that awarded students at private colleges difference between tuition at private and public colleges violated Alaska Constitution, which prohibited payment of public funds for direct benefit of a private educational institution.

OVERVIEW: The grant program 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 that charged by a public college in the same area, not to exceed $ 2,500 annually. The attorney general found that the grants violated Alaska Const. art. VII, 1, which prohibited the payment of money from public funds for the direct benefit of any religious or other private educational institution. The trial court granted summary judgment for the State. On appeal, the court affirmed, holding that the grant program clearly violated 1 because (1) the class primarily benefitted by the tuition grant program consisted only of private colleges and their students; (2) the public funds expended under Alaska Stat. 14.40.776 constituted nothing less than a subsidy of the education received by the student at his private college and thus implicated fully the core concern of the direct benefit provision; (3) the magnitude of benefits bestowed under the program was substantial; and (4) the students to whom benefits were paid were merely conduits for the transmission of state funds to private colleges.

OUTCOME: The summary judgment in favor of the State was affirmed.

LexisNexis Headnotes

Constitutional Law >

Opinion

{599 P.2d 128} 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 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.

{599 P.2d 129} I

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 religion 4 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

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 "metaphysical" {599 P.2d 130} 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.

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

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 {599 P.2d 131} that the superficial form of a benefit will not suffice to define its substantive character. 24

II

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 suffered {599 P.2d 132} "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 application 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 debate 33 indicate that all private educational institutions were meant to be included. The judgment is AFFIRMED.

Footnotes

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 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.

3 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. 1, 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.,* 192 Neb. 358, 220 N.W.2d 550, 553 (1974).

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

9 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, 53 L. Ed. 2d 714, 733, 97 S. Ct. 2593 (1977); *Meek v. Pittenger,* 421 U.S. 349, 364-65, 44 L. Ed. 2d 217, 231, 95 S. Ct. 1753 (1975); *Comm. for Publ. Educ. v. Nyquist,* 413 U.S. 756, 783 n. 39, 37 L. Ed. 2d 948, 969 n. 39, 93 S. Ct. 2955 (1973); *Americans United v. Rogers,* 538 S.W.2d 711, 719 (Mo.), *cert. denied,* 429 U.S. 1029, 50 L. Ed. 2d 632, 97 S. Ct. 653 (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.

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

16 *See Roemer v. Bd. of Publ. Works of Md.,* 426 U.S. 736, 747, 49 L. Ed. 2d 179, 188, 96 S. Ct. 2337 (1976); *Lemon v. Kurtzman,* 403 U.S. 602, 614, 29 L. Ed. 2d 745, 756, 91 S. Ct. 2105 (1971); *Everson v. Bd. of Educ.,* 330 U.S. 1, 18, 91 L. Ed. 711, 724-25, 67 S. Ct. 504 (1947).

17 *See, e.g., Comm. for Publ. Educ. v. Nyquist,* 413 U.S. 756, 782 n. 38, 37 L. Ed. 2d 948, 968 n. 38, 93 S. Ct. 2955 (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, 7 L. Ed. 2d 522, 82 S. Ct. 530 (1962), a statute enabling private school children living far from their schools to ride public school 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.

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

24 *Wolman v. Walter,* 433 U.S. 229, 250, 53 L. Ed. 2d 714, 733-34, 97 S. Ct. 2593 (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, 37 L. Ed. 2d 948, 970, 93 S. Ct. 2955 (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, 37 L. Ed. 2d 948, 968 n. 38, 93 S. Ct. 2955 (1973) (tuition reimbursement to parents of non-public school children); *Sloan v. Lemon,* 413 U.S. 825, 37 L. Ed. 2d 939, 93 S. Ct. 2982 (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)("the 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, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (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, 41 L. Ed. 2d 1134, 94 S. Ct. 3163 (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 1976) (same).

28 Section 1 ch. 230 SLA 1970.

29 Section 2 ch. 136 SLA 1975.

30 AS 14.40.776(a)(2).

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, 50 L. Ed. 2d 632, 97 S. Ct. 653 (1976).

32 *See Roemer v. Bd. of Publ. Works of Md.,* 426 U.S. 736, 49 L. Ed. 2d 179, 96 S. Ct. 2337 (1976)(non-categorical grants to colleges); *Hunt v. McNair,* 413 U.S. 734, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973)(state leaseback arrangement with Baptist college); *Tilton v. Richardson,* 403 U.S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (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.

536 U.S. 639 (2002)

ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, et al. v. SIMMONS-HARRIS et al.

No. 00-1751.

United States Supreme Court.

Argued February 20, 2002.
Decided June 27, 2002.[*]
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

640*640 641*641 Rehnquist, C. J., delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas, JJ., joined. O'Connor, J., *post,* p. 663, and Thomas, J., *post,* p. 676, filed concurring opinions. Stevens, J., filed a dissenting opinion, *post,* p. 684. Souter, J., filed a dissenting opinion, in which Stevens, Ginsburg, and Breyer, JJ., joined, *post,* p. 686. Breyer, J., filed a dissenting opinion, in which Stevens and Souter, JJ., joined, *post,* p. 717.

Judith L. French, Assistant Attorney General of Ohio, argued the cause for petitioners in No. 00-1751. With her on the briefs were *Betty D. Montgomery,* Attorney General, *David M. Gormley,* State Solicitor, *Karen L. Lazorishak, James G. Tassie,* and *Robert L. Strayer,* Assistant Attorneys General, *Kenneth W. Starr,* and *Robert R. Gasaway. David J. Young* argued the cause for petitioners in No. 00-1777. With him on the briefs were *Michael R. Reed* and *David*642*642 *J. Hessler. Clint Bolick, William H. Mellor, Richard D. Komer, Robert Freedman, David Tryon,* and *Charles Fried* filed briefs for petitioners in No. 00-1779.

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McCallum, Deputy Solicitor General Kneedler, Gregory G. Garre, Robert M. Loeb,* and *Lowell V. Sturgill, Jr.*

Robert H. Chanin argued the cause for respondents Simmons-Harris et al. in all cases. With him on the brief were *Andrew D. Roth, Laurence Gold, Steven R. Shapiro, Raymond Vasvari, Elliot M. Mincberg,* and *Judith E. Schaeffer. Marvin E. Frankel* argued the cause for respondents Gatton et al. in all cases. With him on the brief were *David J. Strom, Donald J. Mooney, Jr.,* and *Marc D. Stern.*[†]

643*643 Chief Justice Rehnquist delivered the opinion of the Court.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who 644*644 reside in the Cleveland City School

District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. See *Reed* v. *Rhodes,* No. 1:73 CV 1300 (ND Ohio, Mar. 3, 1995). Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." Cleveland City School District Performance Audit 2-1 (Mar. 1996). The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974-3313.979 (Anderson 1999 and Supp. 2000) (program). The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational 645*645 management of the district by the state superintendent." § 3313.975(A). Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. §§ 3313.975(B) and (C)(1). Second, the program provides tutorial aid for students who choose to remain enrolled in public school. § 3313.975(A).

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. § 313.976(A)(3). Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." § 3313.976(A)(6). Any public school located in a school district adjacent to the covered district may also participate in the program. § 3313.976(C). Adjacent public schools are eligible to receive a $2,250 tuition grant for

each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. §§ 3313.976(C), 3317.03(I)(1).[1] All participating schools, 646*646 whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent. §§ 3313.977(A)(1)(a)—(c).

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250. §§ 3313.978(A) and (C)(1). For these lowest income families, participating private schools may not charge a parental copayment greater than $250. § 3313.976(A)(8). For all other families, the program pays 75% of tuition costs, up to $1,875, with no copayment cap. §§ 3313.976(A)(8), 3313.978(A). These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate.[2] Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school. § 3313.979.

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Parents arrange for registered tutors to provide assistance to their children and then submit bills for those services to the State for payment. §§ 3313.976(D), 3313.979(C). Students from low-income families receive 90% of the amount charged for such assistance up to $360. All other students receive 75% of that amount. § 3313.978(B). The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to students 647*647 enrolled at participating private or adjacent public schools. § 3313.975(A).

The program has been in operation within the Cleveland City School District since the 1996-1997 school year. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998-1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999-2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards, not by local school districts. §§ 3314.01(B), 3314.04. These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999-2000 school year, there were 10 startup community schools in the Cleveland City School

District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of $4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. For each student enrolled in a magnet school, the school district receives $7,746, including state funding of $4,167, the same amount received 648*648 per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. These schools provide specialized teaching methods, such as Montessori, or a particularized curriculum focus, such as foreign language, computers, or the arts.

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. *Simmons-Harris* v. *Goff*, 86 Ohio St. 3d 1, 8-9, 711 N. E. 2d 203, 211 (1999). The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program, 54 F. Supp. 2d 725 (ND Ohio), which we stayed pending review by the Court of Appeals, 528 U. S. 983 (1999). In December 1999, the District Court granted summary judgment for respondents. 72 F. Supp. 2d 834. In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. 234 F. 3d 945 (CA6). The Court of Appeals stayed its mandate pending disposition in this Court. App. to Pet. for Cert. in No. 00-1779, p. 151. We granted certiorari, 533 U. S. 976 (2001), and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" 649*649 or "effect" of advancing or inhibiting religion. *Agostini* v. *Felton*, 521 U. S. 203, 222-223 (1997) ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the `effect' of advancing or inhibiting religion" (citations omitted)). There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell* v. *Helms*, 530 U. S. 793, 810-814 (2000) (plurality opinion); *id.*, at 841-844 (O'Connor, J., concurring in judgment); *Agostini*, *supra*, at 225-227; *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 842 (1995) (collecting cases), and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals, *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993). While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, *Agostini*, *supra*, at 236, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition 650*650 costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. We began by focusing on the class of beneficiaries, finding that because the class included "*all* parents," including parents with "children [who] attend nonsectarian private schools or sectarian private schools," 463 U. S., at 397 (emphasis in original), the program was "not readily subject to challenge under the Establishment Clause," *id.*, at 399 (citing *Widmar* v. *Vincent*, 454 U. S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect")). Then, viewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." 463 U. S., at 399-400. This, we said, ensured that "no `imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.*, at 399 (quoting *Widmar*, *supra*, at 274)). We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools, saying:

"We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U. S., at 401.

That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.

In *Witters*, we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we

observed that "[a]ny aid . . .that ultimately 651*651 flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U. S., at 487. We further remarked that, as in *Mueller,* "[the] program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 474 U. S., at 487 (internal quotation marks omitted). In light of these factors, we held that the program was not inconsistent with the Establishment Clause. *Id.,* at 488-489.

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. 474 U. S., at 490-491 (Powell, J., joined by Burger, C. J., and Rehnquist, J.,concurring) (citing *Mueller, supra,* at 398— 399); 474 U. S., at 493 (O'Connor, J., concurring in part and concurring in judgment); *Id.,* at 490 (White, J., concurring). Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Finally, in *Zobrest,* we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." 509 U. S., at 8. Looking once again to the challenged program as a whole, we observed that the program "distributes benefits neutrally to any child qualifying as `disabled.' " *Id.,* at 10. Its "primary beneficiaries," we said, were "disabled children, not sectarian schools." *Id.,* at 12.

652*652 We further observed that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.,* at 10. Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. *Id.,* at 10-11. See, *e. g., Agostini,* 521 U. S., at 229 ("*Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school"). Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.

Mueller, Witters, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate

choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. As a plurality of this Court recently observed:

"[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special 653*653 favors that might lead to a religious establishment." *Mitchell,* 530 U. S., at 810.

See also *id.,* at 843 (O'Connor, J., concurring in judgment) ("[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, `no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief' " (quoting *Witters,* 474 U. S., at 493 (O'Connor, J., concurring in part and concurring in judgment))). It is precisely for these reasons that we have never found a program of true private choice to offend the Establishment Clause.

We believe that the program challenged here is a program of true private choice, consistent with *Mueller, Witters,* and *Zobrest,* and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i. e.,* any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools. *Witters, supra,* at 487-488. Such incentives "[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious 654*654 and secular beneficiaries on a nondiscriminatory basis." *Agostini, supra,* at 231. The program here in fact creates financial *dis* incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program

are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentive[s] for parents to choose a sectarian school." *Zobrest*, 509 U. S., at 10.[3]

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." Brief for Respondents Simmons-Harris et al. 37-38. But we have repeatedly recognized 655*655 that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. *Mueller*, 463 U. S., at 399; *Witters*, *supra*, at 488-489; *Zobrest*, *supra*, at 10-11; *e. g.*, *Mitchell*, *supra*, at 842-843 (O'Connor, J., concurring in judgment) ("In terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools"). The argument is particularly misplaced here since "the reasonable observer in the endorsement inquiry must be deemed aware" of the "history and context" underlying a challenged program. *Good News Club* v. *Milford Central School*, 533 U. S. 98, 119 (2001) (internal quotation marks omitted). See also *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment). Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing 656*656 parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

Justice Souter speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. *Post*, at 703-705 (dissenting opinion).[4] But Cleveland's preponderance of religiously affiliated 657*657 private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. See U. S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey: 1999-2000, pp. 2-4 (NCES 2001-330, 2001) (hereinafter Private School Universe Survey) (cited in Brief for United States as *Amicus Curiae* 24). Indeed,

by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. See Brief for State of Florida et al. as *Amici Curiae* 16 (citing Private School Universe Survey). To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, see Ohio Educational Directory (Lodging of Respondents Gatton et al., available in Clerk of Court's case file), and Reply Brief for Petitioners in No. 00-1751, p. 12, n. 1, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. Cf. Brief for State of Florida et al. as *Amici Curiae* 17 ("[T]he percentages of sectarian to nonsectarian private schools within Florida's 67 school districts . . . vary from zero to 100 percent"). Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less 658*658 than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools. *Id.,* at 15-16 (citing Private School Universe Survey).

Respondents and Justice Souter claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller,* where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools. See *Agostini,* 521 U. S., at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid" (citing *Mueller,* 463 U. S., at 401)); see also *Mitchell,* 530 U. S., at 812, n. 6 (plurality opinion) ("*[Agostini]* held that the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the constitutional inquiry"); *id.,* at 848 (O'Connor, J., concurring in judgment) (same) (quoting *Agostini, supra,* at 229). The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller,* "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." 463 U. S., at 401.

659*659 This point is aptly illustrated here. The 96% figure upon which respondents and Justice Souter rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional

public schools with tutorial assistance. See *supra,* at 647-648. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999— 2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. See also J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting that only 16.5% of nontraditional schoolchildren in Cleveland choose religious schools). The 96% figure also represents but a snapshot of one particular school year. In the 1997— 1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. See App. to Pet. for Cert. in No. 00-1751, p. 5a. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. See App. 59a—62a, 209a, 223a—227a.[5] Many of the students enrolled in these schools 660*660 as scholarship students remained enrolled as community school students, *id.,* at 145a—146a, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect, *e. g.,* Ohio Rev. Code Ann. § 3314.11 (Anderson 1999) (establishing a single "office of school options" to "provide services that facilitate the management of the community schools program and the pilot project scholarship program"). In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications. Tr. of Oral Arg. 52-60.[6]

661*661 Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973), to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, *id.,* at 773-774, we found that its "function" was "*unmistakably* to provide desired financial support for nonpublic, sectarian institutions," *id.,* at 783 (emphasis added). Its genesis, we said, was that private religious schools faced "increasingly grave fiscal problems." *Id.,* at 795. The program thus provided direct money grants to religious schools. *Id.,* at 762-764. It provided tax benefits "unrelated to the amount of money actually expended by any parent on tuition," ensuring a windfall to parents of children in religious schools. *Id.,* at 790. It similarly provided tuition reimbursements designed explicitly to "offe[r] . . . an incentive to parents to send their children to sectarian schools." *Id.,* at 786. Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. *Id.,* at 763-765. Ohio's program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to "a case involving some form of public assistance (*e. g.,* scholarships) made available generally without regard to the sectariannonsectarian, or public-nonpublic nature of the institution benefited." *Id.,* at 782-783, n. 38. That, of course, is the very question now before us, and it has since been answered, first in *Mueller,* 463 U. S., at 398-399 ("[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is

not readily subject to challenge under the Establishment Clause" (citing *Nyquist, supra,* at 782-783, n. 38)), 662*662 then in *Witters,* 474 U. S., at 487 ("Washington's program is `made available generally without regard to the sectariannonsectarian, or public-nonpublic nature of the institution benefited' " (quoting *Nyquist, supra,* at 782-783, n. 38)), and again in *Zobrest,* 509 U. S., at 12-13 ("[T]he function of the [program] is hardly `to provide desired financial support for nonpublic, sectarian institutions' " (quoting *Nyquist, supra,* at 782-783, n. 38)). To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.[7]

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of 663*663 decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice O'Connor, concurring.

The Court holds that Ohio's Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974-3313.979 (Anderson 1999 and Supp. 2000) (voucher program), survives respondents' Establishment Clause challenge. While I join the Court's opinion, I write separately for two reasons. First, although the Court takes an important step, I do not believe that today's decision, when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence, marks a dramatic break from the past. Second, given the emphasis the Court places on verifying that parents of voucher students in religious schools have exercised "true private choice," I think it is worth elaborating on the Court's conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the educational system in Cleveland actually functions.

I

These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds. The share of public resources that reach religious schools is not, however, as significant as respondents suggest. See, *e. g.,* Brief for Respondents Simmons-Harris et al. 1-2. Data from the 1999-2000 school year indicate that 82 percent of schools participating in the voucher program were religious

and that 96 percent of participating students enrolled in religious 664*664 schools, see App. in Nos. 00-3055, etc. (CA6), p. 1679 (46 of 56 private schools in the program are religiously affiliated; 3,637 of 3,765 voucher students attend religious private schools), but these data are incomplete. These statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools. When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent. See J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting 2,087 students in community schools and 16,184 students in magnet schools).

Even these numbers do not paint a complete picture. The Cleveland program provides voucher applicants from lowincome families with up to $2,250 in tuition assistance and provides the remaining applicants with up to $1,875 in tuition assistance. §§ 3313.976(A)(8), 3313.978(A) and (C)(1). In contrast, the State provides community schools $4,518 per pupil and magnet schools, on average, $7,097 per pupil. Affidavit of Caroline M. Hoxby ¶¶ 4b, 4c, App. 56a. Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $2,250 voucher, at most $8.2 million of public funds flowed to religious schools under the voucher program in 1999-2000. Although just over one-half as many students attended community schools as religious private schools on the state fisc, the State spent over $1 million more—$9.4 million—on students in community schools than on students in religious private schools because per-pupil aid to community schools is more than double the per-pupil aid to private schools under the voucher program. Moreover, the amount spent on religious private schools is minor compared to the $114.8 million the State spent on students in the Cleveland magnet schools.

665*665 Although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax, see 26 U. S. C. § 501(c)(3); the corporate income tax in many States, see, *e. g.,* Cal. Rev. & Tax. Code Ann. § 23701d (West 1992); and property taxes in all 50 States, see Turner, Property Tax Exemptions for Nonprofits, 12 Probate & Property 25 (Sept./Oct. 1998); and clergy qualify for a federal tax break on income used for housing expenses, 26 U. S. C. § 1402(a)(8). In addition, the Federal Government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. See §§ 170, 642(c). Finally, the Federal Government and certain state governments provide tax credits for educational expenses, many of which are spent on education at religious schools. See, *e. g.,* § 25A (Hope tax credit); Minn. Stat. § 290.0674 (Supp. 2001).

Most of these tax policies are well established, see, *e. g.,* *Mueller* v. *Allen,* 463 U. S. 388 (1983) (upholding Minnesota tax deduction for educational expenses); *Walz* v. *Tax Comm'n of City of New York,* 397 U. S. 664 (1970) (upholding an exemption for religious organizations from New York property tax), yet confer a significant relative

benefit on religious institutions. The state property tax exemptions for religious institutions alone amount to very large sums annually. For example, available data suggest that Colorado's exemption lowers that State's tax revenues by more than $40 million annually, see Rabey, Exemptions a Matter of Faith: No Proof Required of Tax-Free Churches, Colorado Springs Gazette Telegraph, Oct. 26, 1992, p. B1; Colorado Debates Church, Nonprofit Tax-Exempt Status, Philadelphia Enquirer, Oct. 4, 1996, p. 8; Maryland's exemption lowers revenues by more than $60 million, see Maryland Dept. of Assessment and Taxation, 2001 SDAT Annual Report (Apr. 25, 2002), http://www.dat.state.md.us/sdatweb/stats/ 666*666 01ar_rpt.html (Internet sources available in Clerk of Court's case file); Wisconsin's exemption lowers revenues by approximately $122 million, see Wisconsin Dept. of Revenue, Division of Research and Analysis, Summary of Tax Exemption Devices 2001, Property Tax (Apr. 25, 2002), http://www.dor. state.wi.us/ra/sum00pro.html ($5.688 billion in exempt religious property; statewide average property tax rate of $21.46 per $1,000 of property); and Louisiana's exemption, looking just at the city of New Orleans, lowers revenues by over $36 million, see Bureau of Governmental Research, Property Tax Exemptions and Assessment Administration in Orleans Parish: Summary and Recommendations 2 (Dec. 1999) ($22.6 million for houses of worship and $14.1 million for religious schools). As for the Federal Government, the tax deduction for charitable contributions reduces federal tax revenues by nearly $25 billion annually, see U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 344 (2000) (hereinafter Statistical Abstract), and it is reported that over 60 percent of household charitable contributions go to religious charities, *id.,* at 397. Even the relatively minor exemptions lower federal tax receipts by substantial amounts. The parsonage exemption, for example, lowers revenues by around $500 million. See Diaz, Ramstad Prepares Bill to Retain Tax Break for Clergy's Housing, Star Tribune (Minneapolis-St. Paul), Mar. 30, 2002, p. 4A.

These tax exemptions, which have "much the same effect as [cash grants] . . . of the amount of tax [avoided]," *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 544 (1983); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 859-860, esp. n. 4 (1995) (Thomas, J., concurring), are just part of the picture. Federal dollars also reach religiously affiliated organizations through public health programs such as Medicare, 42 U. S. C. §§ 1395— 1395ggg, and Medicaid, § 1396 *et seq.,* through educational programs such as the Pell Grant program, 20 U. S. C. § 1070a, and the G. I. Bill of Rights, 38 U. S. C. §§ 3451, 3698; and 667*667 through childcare programs such as the Child Care and Development Block Grant Program (CCDBG), 42 U. S. C. § 9858 (1994 ed., Supp. V). Medicare and Medicaid provide federal funds to pay for the healthcare of the elderly and the poor, respectively, see 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law 545-546 (2d ed. 2000); 2 *id.,* at 2; the Pell Grant program and the G. I. Bill subsidize higher education of low-income individuals and veterans, respectively, see Mulleneaux, The Failure to Provide Adequate Higher Education Tax Incentives for Lower-Income Individuals, 14 Akron Tax J. 27, 31 (1999); and the CCDBG program finances child care for low-income parents, see Pitegoff, Child Care Policy and the Welfare Reform Act, 6 J. Affordable Housing & Community Dev. L. 113, 121-122 (1997). These programs are well-

established parts of our social welfare system, see, *e. g.,* Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U. S. 756, 782-783, n. 38 (1973), and can be quite substantial, see Statistical Abstract 92 (Table 120) ($211.4 billion spent on Medicare and nearly $176.9 billion on Medicaid in 1998), *id.,* at 135 (Table 208) ($9.1 billion in financial aid provided by the Department of Education and $280.5 million by the Department of Defense in 1999); Bush On Welfare: Tougher Work Rules, More State Control, Congress Daily, Feb. 26, 2002, p. 8 ($4.8 billion for the CCDBG program in 2001).

A significant portion of the funds appropriated for these programs reach religiously affiliated institutions, typically without restrictions on its subsequent use. For example, it has been reported that religious hospitals, which account for 18 percent of all hospital beds nationwide, rely on Medicare funds for 36 percent of their revenue. MergerWatch, New Study Details Public Funding of Religious Hospitals (Jan. 2002), http://www.mergerwatch.org/inthenews/ publicfunding.html. Moreover, taking into account both Medicare and Medicaid, religious hospitals received nearly $45 billion from the federal fisc in 1998. *Ibid.* Federal aid 668*668 to religious schools is also substantial. Although data for all States are not available, data from Minnesota, for example, suggest that a substantial share of Pell Grant and other federal funds for college tuition reach religious schools. Roughly one-third or $27.1 million of the federal tuition dollars spent on students at schools in Minnesota were used at private 4-year colleges. Minnesota Higher Education Services Office, Financial Aid Awarded, Fiscal Year 1999: Grants, Loans, and Student Earning from Institution Jobs (Jan. 24, 2001). The vast majority of these funds—$23.5 million— flowed to religiously affiliated institutions. *Ibid.*

Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs. While this observation is not intended to justify the Cleveland voucher program under the Establishment Clause, see *post,* at 709-710, n. 19 (Souter, J., dissenting), it places in broader perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases. See *post,* at 685-686 (Stevens, J., dissenting); *post,* at 715-716 (Souter, J., dissenting); *post,* p. 717 (Breyer, J., dissenting).

II

Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence. A central tool in our analysis of cases in this area has been the *Lemon* test. As originally formulated, a statute passed this test only if it had "a secular legislative purpose," if its "principal or primary effect" was one that "neither advance[d] nor inhibit[ed] religion," and if it did "not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U. S. 602, 612-613 (1971) (internal quotation marks omitted). In Agostini v. Felton, 521 U. S. 203, 218, 232-233 (1997), we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, see *ibid.,* and the degree of entanglement 669*669 has implications for whether a statute advances or inhibits religion, see Lynch v.

Donnelly, 465 U. S. 668, 688 (1984) (O'Connor, J., concurring). The test today is basically the same as that set forth in *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 222 (1963) (citing *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947); *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961)), over 40 years ago.

The Court's opinion in these cases focuses on a narrow question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases? Specifically, it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, *Lemon* v. *Kurtzman*, *supra*, at 613-614, or, as I have put it, of "endors[ing] or disapprov[ing] . . . religion," *Lynch* v. *Donnelly*, *supra*, at 691-692 (concurring opinion); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 69-70 (1985) (O'Connor, J., concurring in judgment). See also *ante,* at 652. Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause. See *ante,* at 652-653.

Justice Souter portrays this inquiry as a departure from *Everson*. See *post,* at 687-688 (dissenting opinion). A fair reading of the holding in that case suggests quite the opposite. Justice Black's opinion for the Court held that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary." *Everson*, *supra*, at 18; see also *Schempp*, *supra*, at 218, 222. 670*670 How else could the Court have upheld a state program to provide students transportation to public and religious schools alike? What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the *Lemon* test surely does not betray *Everson*.

III

There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious schools. See *ante,* at 653-654. Justice Souter rejects the Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents but rather by its effects. In particular, a "neutrality test . . . [should] focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction." *Post,* at 697 (dissenting opinion). Justice Souter doubts that the Cleveland program is neutral under this view. He surmises that the cap on tuition that voucher schools may charge low-income students encourages these students to attend religious rather than nonreligious private voucher schools. See *post,* at 704-705. But Justice Souter's notion of neutrality is inconsistent with that in our case law. As we put it in

Agostini, government aid must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U. S., at 231.

I do not agree that the nonreligious schools have failed to provide Cleveland parents reasonable alternatives to religious schools in the voucher program. For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents. The District Court record demonstrates that nonreligious schools were able to compete effectively 671*671 with Catholic and other religious schools in the Cleveland voucher program. See *ante,* at 656-657, n. 4. The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents send their children to community and magnet schools rather than seeking vouchers at all. *Supra,* at 663-664. Moreover, there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school. See 234 F. 3d 945, 969 (CA6 2000) (Ryan, J., concurring in part and dissenting in part); Affidavit of David L. Brennan ¶ 8, App. 147a.

To support his hunch about the effect of the cap on tuition under the voucher program, Justice Souter cites national data to suggest that, on average, Catholic schools have a cost advantage over other types of schools. See *post,* at 705-706, n. 15 (dissenting opinion). Even if national statistics were relevant for evaluating the Cleveland program, Justice Souter ignores evidence which suggests that, at a national level, nonreligious private schools may target a market for a different, if not a higher, quality of education. For example, nonreligious private schools are smaller, see U. S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey, 1997-1998 (Oct. 1999) (Table 60) (87 and 269 students per private nonreligious and Catholic elementary school, respectively); have smaller class sizes, see *ibid.* (9.4 and 18.8 students per teacher at private nonreligious and Catholic elementary schools, respectively); have more highly educated teachers, see U. S. Dept. of Ed., National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993-1994 (NCES 97-459, July 1997) (Table 3.4) (37.9 percent of nonreligious private school teachers but only 29.9 percent of Catholic school teachers have Master's degrees); and have principals with longer job tenure than Catholic schools, see *ibid.* (Table 3.7) (average tenure 672*672 of principals at private nonreligious and Catholic schools is 8.2 and 4.7 years, respectively).

Additionally, Justice Souter's theory that the Cleveland voucher program's cap on the tuition encourages low-income students to attend religious schools ignores that these students receive nearly double the amount of tuition assistance under the community schools program than under the voucher program and that none of the community schools is religious. See *ante,* at 647.

In my view the more significant finding in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of true private choice. The Court rejects, correctly, the notion that the high percentage of

voucher recipients who enroll in religious private schools necessarily demonstrates that parents do not actually have the option to send their children to nonreligious schools. *Ante,* at 656-660. Likewise, the mere fact that some parents enrolled their children in religious schools associated with a different faith than their own, see *post,* at 704 (Souter, J., dissenting), says little about whether these parents had reasonable nonreligious options. Indeed, no voucher student has been known to be turned away from a nonreligious private school participating in the voucher program. *Supra* this page. This is impressive given evidence in the record that the present litigation has discouraged the entry of some nonreligious private schools into the voucher program. Declaration of David P. Zanotti ¶¶ 5, 10, App. 225a, 227a. Finally, as demonstrated above, the Cleveland program does not establish financial incentives to undertake a religious education.

I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries of the government program should be considered. In these cases, parents who were eligible to 673*673 apply for a voucher also had the option, at a minimum, to send their children to community schools. Yet the Court of Appeals chose not to look at community schools, let alone magnet schools, when evaluating the Cleveland voucher program. See 234 F. 3d, at 958. That decision was incorrect. Focusing in these cases only on the program challenged by respondents ignores how the educational system in Cleveland actually functions. The record indicates that, in 1999, two nonreligious private schools that had previously served 15 percent of the students in the voucher program were prompted to convert to community schools because parents were concerned about the litigation surrounding the program, and because a new community schools program provided more per-pupil financial aid. Many of the students that enrolled in the two schools under the voucher program transferred to the community schools program and continued to attend these schools. See Affidavit of David L. Brennan ¶¶ 3, 10, App. 145a, 147a; Declaration of David P. Zanotti ¶¶ 4-10, *id.,* at 225a—227a. This incident provides strong evidence that both parents and nonreligious schools view the voucher program and the community schools program as reasonable alternatives.

Considering all the educational options available to parents whose children are eligible for vouchers, including community and magnet schools, the Court finds that parents in the Cleveland schools have an array of nonreligious options. *Ante,* at 655. Not surprisingly, respondents present no evidence that any students who were candidates for a voucher were denied slots in a community school or a magnet school. Indeed, the record suggests the opposite with respect to community schools. See Affidavit of David L. Brennan ¶ 8, App. 147a.

Justice Souter nonetheless claims that, of the 10 community schools operating in Cleveland during the 1999-2000 school year, 4 were unavailable to students with vouchers and 4 others reported poor test scores. See *post,* at 702— 674*674 703, n. 10 (dissenting opinion). But that analysis unreasonably limits the choices available to Cleveland parents. It is undisputed that Cleveland's 24 magnet schools are reasonable

alternatives to voucher schools. See *post,* at 701— 702, n. 9 (Souter, J., dissenting); http://www.cmsdnet.net/ administration/EducationalServices/magnet.htm (June 20, 2002). And of the four community schools Justice Souter claims are unavailable to voucher students, he is correct only about one (Life Skills Center of Cleveland). Affidavit of Steven M. Puckett ¶ 12, App. 162a. Justice Souter rejects the three other community schools (Horizon Science Academy, Cleveland Alternative Learning, and International Preparatory School) because they did not offer primary school classes, were targeted toward poor students or students with disciplinary or academic problems, or were not in operation for a year. See *post,* at 702-703, n. 10. But a community school need not offer primary school classes to be an alternative to religious middle schools, and catering to impoverished or otherwise challenged students may make a school more attractive to certain inner-city parents. Moreover, the one community school that was closed in 1999— 2000 was merely looking for a new location and was operational in other years. See Affidavit of Steven M. Puckett ¶ 12, App. 162a; Ohio Dept. of Ed., Office of School Options, Community Schools, Ohio's Community School Directory (June 22, 2002), http://www.ode.state.oh.us/community_ schools/community_school_directory/default.asp. Two more community schools were scheduled to open after the 1999— 2000 school year. See Affidavit of Steven M. Puckett ¶ 13, App. 163a.

Of the six community schools that Justice Souter admits as alternatives to the voucher program in 1999-2000, he notes that four (the Broadway, Cathedral, Chapelside, and Lincoln Park campuses of the Hope Academy) reported lower test scores than public schools during the school year *after* the District Court's grant of summary judgment to respondents, 675*675 according to report cards prepared by the Ohio Department of Education. See *post,* at 702-703, n. 10 (dissenting opinion). (One, Old Brooklyn Montessori School, performed better than public schools. *Ibid.;* see also Ohio Dept. of Ed., 2001 Community School Report Card, Old Brooklyn Montessori School 5 (community school scored higher than public schools in four of five subjects in 1999— 2000).) These report cards underestimate the value of the four Hope Academy schools. Before they entered the community school program, two of them participated in the voucher program. Although they received far less state funding in that capacity, they had among the highest rates of parental satisfaction of all voucher schools, religious or nonreligious. See P. Peterson, W. Howell, & J. Greene, An Evaluation of the Cleveland Voucher Program after Two Years 6, Table 4 (June 1999) (hereinafter Peterson). This is particularly impressive given that a Harvard University study found that the Hope Academy schools attracted the "poorest and most educationally disadvantaged students." J. Greene, W. Howell, P. Peterson, Lessons from the Cleveland Scholarship Program 22, 24 (Oct. 15, 1997). Moreover, Justice Souter's evaluation of the Hope Academy schools assumes that the only relevant measure of school quality is academic performance. It is reasonable to suppose, however, that parents in the inner city also choose schools that provide discipline and a safe environment for their children. On these dimensions some of the schools that Justice Souter derides have performed quite ably. See Peterson, Table 7.

Ultimately, Justice Souter relies on very narrow data to draw rather broad conclusions. One year of poor test scores at four community schools targeted at the most challenged students from the inner city says little about the value of those schools, let alone the quality of the 6 other community schools and 24 magnet schools in Cleveland. Justice Souter's use of statistics confirms the Court's wisdom in refusing 676*676 to consider them when assessing the Cleveland program's constitutionality. See *ante,* at 658. What appears to motivate Justice Souter's analysis is a desire for a limiting principle to rule out certain nonreligious schools as alternatives to religious schools in the voucher program. See *post,* at 700, 701-702, n. 9 (dissenting opinion). But the goal of the Court's Establishment Clause jurisprudence is to determine whether, after the Cleveland voucher program was enacted, parents were free to direct state educational aid in either a nonreligious or religious direction. See *ante,* at 655-656. That inquiry requires an evaluation of all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program.

Based on the reasoning in the Court's opinion, which is consistent with the realities of the Cleveland educational system, I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause.

Justice Thomas, concurring.

Frederick Douglass once said that "[e]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free."[1] Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954), that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them. These cases present an 677*677 example of such failures. Besieged by escalating financial problems and declining academic achievement, the Cleveland City School District was in the midst of an academic emergency when Ohio enacted its scholarship program.

The dissents and respondents wish to invoke the Establishment Clause of the First Amendment, as incorporated through the Fourteenth, to constrain a State's neutral efforts to provide greater educational opportunity for underprivileged minority students. Today's decision properly upholds the program as constitutional, and I join it in full.

I

This Court has often considered whether efforts to provide children with the best educational resources conflict with constitutional limitations. Attempts to provide aid to religious schools or to allow some degree of religious involvement in public schools have generated significant controversy and litigation as States try to navigate the line

between the secular and the religious in education. See generally *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203, 237-238 (1948) (Jackson, J., concurring) (noting that the Constitution does not tell judges "where the secular ends and the sectarian begins in education"). We have recently decided several cases challenging federal aid programs that include religious schools. See, *e. g.*, *Mitchell* v. *Helms*, 530 U. S. 793 (2000); *Agostini* v. *Felton*, 521 U. S. 203 (1997). To determine whether a federal program survives scrutiny under the Establishment Clause, we have considered whether it has a secular purpose and whether it has the primary effect of advancing or inhibiting religion. See *Mitchell*, *supra*, at 807-808. I agree with the Court that Ohio's program easily passes muster under our stringent test, but, as a matter of first principles, I question whether this test should be applied to the States.

678*678 The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." On its face, this provision places no limit on the States with regard to religion. The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government.[2] Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question.

The Fourteenth Amendment fundamentally restructured the relationship between individuals and the States and ensured that States would not deprive citizens of liberty without due process of law. It guarantees citizenship to all individuals born or naturalized in the United States and provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As Justice Harlan noted, the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty." *Plessy* v. *Ferguson*, 163 U. S. 537, 555 (1896) (dissenting opinion). When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.

Consequently, in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral 679*679 basis—than the Federal Government." *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 699 (1970) (Harlan, J., concurring). Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.[3]

Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights.[4] But I 680*680 cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice.

II

The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context. Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment. Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children.[5] This is a choice that those with greater means have routinely exercised.

681*681 Cleveland parents now have a variety of educational choices. There are traditional public schools, magnet schools, and privately run community schools, in addition to the scholarship program. Currently, 46 of the 56 private schools participating in the scholarship program are church affiliated (35 are Catholic), and 96 percent of students in the program attend religious schools. See App. 281a—286a; 234 F. 3d 945, 949 (CA6 2000). Thus, were the Court to disallow the inclusion of religious schools, Cleveland children could use their scholarships at only 10 private schools.

In addition to expanding the reach of the scholarship program, the inclusion of religious schools makes sense given Ohio's purpose of increasing educational performance and opportunities. Religious schools, like other private schools, achieve far better educational results than their public counterparts. For example, the students at Cleveland's Catholic schools score significantly higher on Ohio proficiency tests than students at Cleveland public schools. Of Cleveland eighth graders taking the 1999 Ohio proficiency test, 95 percent in Catholic schools passed the reading test, whereas only 57 percent in public schools passed. And 75 percent of Catholic school students passed the math proficiency test, compared to only 22 percent of public school students. See Brief for Petitioners in No. 00-1777, p. 10. But the success of religious and private schools is in the end beside the point, because the State has a constitutional right to experiment with a variety of different programs to promote educational opportunity. That Ohio's program includes successful schools simply indicates that such reform can in fact provide improved education to underprivileged urban children.

Although one of the purposes of public schools was to promote democracy and a more egalitarian culture,[6] failing urban public schools disproportionately affect minority

children most in need of educational opportunity. At the time 682*682 of Reconstruction, blacks considered public education "a matter of personal liberation and a necessary function of a free society." J. Anderson, Education of Blacks in the South, 1860-1935, p. 18 (1988). Today, however, the promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities.[7] Opponents of the program raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment.

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: "Most black people have faced too many grim, concrete problems to be romantics. They want and need certain tangible results, which can be achieved only by developing certain specific abilities." Black Education: Myths and Tragedies 228 (1972). The same is true today. An individual's life prospects increase dramatically with each successfully completed phase of education. For instance, a black high 683*683 school dropout earns just over $13,500, but with a high school degree the average income is almost $21,000. Blacks with a bachelor's degree have an average annual income of about $37,500, and $75,500 with a professional degree. See U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 140 (2001) (Table 218). Staying in school and earning a degree generates real and tangible financial benefits, whereas failure to obtain even a high school degree essentially relegates students to a life of poverty and, all too often, of crime.[8] The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.

* * *

Ten States have enacted some form of publicly funded private school choice as one means of raising the quality of education provided to underprivileged urban children.[9] These programs address the root of the problem with failing urban public schools that disproportionately affect minority students. Society's other solution to these educational failures is often to provide racial preferences in higher education. Such preferences, however, run afoul of the Fourteenth Amendment's prohibition against distinctions based on race. See *Plessy*, 163 U. S., at 555 (Harlan, J., dissenting). By contrast, school choice programs that involve religious schools 684*684 appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need.

As Frederick Douglass poignantly noted, "no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education."[10]

Justice Stevens, dissenting.

Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar schoolchildren in particular religious faiths a "law respecting an establishment of religion" within the meaning of the First Amendment? In answering that question, I think we should ignore three factual matters that are discussed at length by my colleagues.

First, the severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program is not a matter that should affect our appraisal of its constitutionality. In the 1999-2000 school year, that program provided relief to less than five percent of the students enrolled in the district's schools. The solution to the disastrous conditions that prevented over 90 percent of the student body from meeting basic proficiency standards obviously required massive improvements unrelated to the voucher program.[1] Of course, the emergency may have 685*685 given some families a powerful motivation to leave the public school system and accept religious indoctrination that they would otherwise have avoided, but that is not a valid reason for upholding the program.

Second, the wide range of choices that have been made available to students *within the public school system* has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education. The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one "respecting an establishment of religion." The State may choose to divide up its public schools into a dozen different options and label them magnet schools, community schools, or whatever else it decides to call them, but the State is still required to provide a public education and it is the State's decision to fund private school education over and above its traditional obligation that is at issue in these cases.[2]

Third, the voluntary character of the private choice to prefer a parochial education over an education in the public school system seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible. Today, however, the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds.

For the reasons stated by Justice Souter and Justice Breyer, I am convinced that the Court's decision is profoundly misguided. Admittedly, in reaching that conclusion 686*686 I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of

neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.

I respectfully dissent.

Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting.

The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." *Agostini* v. *Felton*, 521 U. S. 203, 254 (1997) (Souter, J., dissenting). I therefore respectfully dissent.

The applicability of the Establishment Clause[1] to public funding of benefits to religious schools was settled in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), which inaugurated 687*687 the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.,* at 16.

The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson.*

Today, however, the majority holds that the Establishment Clause is not offended by Ohio's Pilot Project Scholarship Program, under which students may be eligible to receive as much as $2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.[2] Public tax money will pay at a systemic level

for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

688*688 How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.

I

The majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. My object here is not to give any nuanced exposition of the cases, which I tried to classify in some detail in an earlier opinion, see *Mitchell* v. *Helms*, 530 U. S. 793, 873-899 (2000) (dissenting opinion), but to set out the broad doctrinal stages covered in the modern era, and to show that doctrinal bankruptcy has been reached today.

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria 689*689 of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

A

Everson v. *Board of Ed. of Ewing* inaugurated the modern development of Establishment Clause doctrine at the behest of a taxpayer challenging state provision of "tax-raised funds to pay the bus fares of parochial school pupils" on regular city buses as part of a general scheme to reimburse the public-transportation costs of children attending both public and private nonprofit schools. 330 U. S., at 17. Although the Court split, no Justice disagreed with the basic doctrinal principle already quoted, that "[n]o tax in any amount . . . can be levied to support any religious activities or institutions, . . .

whatever form they may adopt to teach . . . religion." *Id.,* at 16. Nor did any Member of the Court deny the tension between the New Jersey program and the aims of the Establishment Clause. The majority upheld the state law on the strength of rights of religious-school students under the Free Exercise Clause, *id.,* at 17-18, which was thought to entitle them to free public transportation when offered as a "general government servic[e]" to all schoolchildren, *id.,* at 17. Despite the indirect benefit to religious education, the transportation was simply treated like "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," *id.,* at 17-18, and, most significantly, "state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic," *id.,* at 17. The dissenters, however, found the benefit to religion too pronounced to survive the general principle of no establishment, no aid, and they described it as running counter to every objective served by the establishment ban: New Jersey's use of tax-raised funds forced a taxpayer to "contribut[e] to the propagation of opinions which he disbelieves in so far as . . . religions differ," *id.,* at 45 (internal quotation marks omitted); it exposed religious 690*690 liberty to the threat of dependence on state money, *id.,* at 53; and it had already sparked political conflicts with opponents of public funding, *id.,* at 54.[3]

The difficulty of drawing a line that preserved the basic principle of no aid was no less obvious some 20 years later in *Board of Ed. of Central School Dist. No. 1* v. *Allen,* 392 U. S. 236 (1968), which upheld a New York law authorizing local school boards to lend textbooks in secular subjects to children attending religious schools, a result not self-evident from *Everson*'s "general government services" rationale. The Court relied instead on the theory that the in-kind aid could only be used for secular educational purposes, 392 U. S., at 243, and found it relevant that "no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools," *id.,* at 243— 244.[4] Justice Black, who wrote *Everson,* led the dissenters. Textbooks, even when "`secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect," 392 U. S., at 252, he wrote, and Justice Douglas raised other objections underlying the establishment ban, *id.,* at 254-266. Religious schools would request those books most in keeping with their faiths, and public boards would have final approval power: "If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church 691*691 and state separate has been lost. If the board resists, then the battle line between church and state will have been drawn . . . ." *Id.,* at 256 (Douglas, J., dissenting). The scheme was sure to fuel strife among religions as well: "we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church." *Id.,* at 265.

Transcending even the sharp disagreement, however, was

"the consistency in the way the Justices went about deciding the case . . . . Neither side rested on any facile application of the `test' or any simplistic reliance on the generality or evenhandedness of the state law. Disagreement concentrated on the true intent inferrable behind the law, the feasibility of distinguishing in fact between religious and

secular teaching in church schools, and the reality or sham of lending books to pupils instead of supplying books to schools. . . . [T]he stress was on the practical significance of the actual benefits received by the schools." *Mitchell*, 530 U. S., at 876 (Souter, J., dissenting).

B

Allen recognized the reality that "religious schools pursue two goals, religious instruction and secular education," 392 U. S., at 245; if state aid could be restricted to serve the second, it might be permissible under the Establishment Clause. But in the retrenchment that followed, the Court saw that the two educational functions were so intertwined in religious primary and secondary schools that aid to secular education could not readily be segregated, and the intrusive monitoring required to enforce the line itself raised Establishment Clause concerns about the entanglement of church and state. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 620 (1971) (striking down program supplementing salaries for teachers of secular subjects in private schools). To avoid 692*692 the entanglement, the Court's focus in the post-*Allen* cases was on the principle of divertibility, on discerning when ostensibly secular government aid to religious schools was susceptible to religious uses. The greater the risk of diversion to religion (and the monitoring necessary to avoid it), the less legitimate the aid scheme was under the no-aid principle. On the one hand, the Court tried to be practical, and when the aid recipients were not so "pervasively sectarian" that their secular and religious functions were inextricably intertwined, the Court generally upheld aid earmarked for secular use. See, *e. g.*, *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736 (1976); *Hunt* v. *McNair*, 413 U. S. 734 (1973); *Tilton* v. *Richardson*, 403 U. S. 672 (1971). But otherwise the principle of nondivertibility was enforced strictly, with its violation being presumed in most cases, even when state aid seemed secular on its face. Compare, *e. g.*, *Levitt* v. *Committee for Public Ed. & Religious Liberty*, 413 U. S. 472, 480 (1973) (striking down state program reimbursing private schools' administrative costs for teacher-prepared tests in compulsory secular subjects), with *Wolman* v. *Walter*, 433 U. S. 229, 255 (1977) (upholding similar program using standardized tests); and *Meek* v. *Pittenger*, 421 U. S. 349, 369-372 (1975) (no public funding for staff and materials for "auxiliary services" like guidance counseling and speech and hearing services), with *Wolman*, *supra*, at 244 (permitting state aid for diagnostic speech, hearing, and psychological testing).

The fact that the Court's suspicion of divertibility reflected a concern with the substance of the no-aid principle is apparent in its rejection of stratagems invented to dodge it. In *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), for example, the Court struck down a New York program of tuition grants for poor parents and tax deductions for more affluent ones who sent their children to private schools. The *Nyquist* Court dismissed warranties of a "statistical guarantee," that the scheme provided at most 15% of the total cost of an education at a religious school, 693*693 *id.*, at 787-788, which could presumably be matched to a secular 15% of a child's education at the school. And it rejected the idea that the path of state aid to religious schools might be dispositive: "far from providing a *per se* immunity from examination of the substance

of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.,* at 781. The point was that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.,* at 783.[5] *Nyquist* thus held that aid to parents through tax deductions was no different from forbidden direct aid to religious schools for religious uses. The focus remained on what the public money bought when it reached the end point of its disbursement.

C

Like all criteria requiring judicial assessment of risk, divertibility is an invitation to argument, but the object of the arguments provoked has always been a realistic assessment of facts aimed at respecting the principle of no aid. In *Mueller* v. *Allen,* 463 U. S. 388 (1983), however, that object began to fade, for *Mueller* started down the road from realism to formalism.

694*694 The aid in *Mueller* was in substance indistinguishable from that in *Nyquist,* see 463 U. S., at 396-397, n. 6, and both were substantively difficult to distinguish from aid directly to religious schools, *id.,* at 399. But the Court upheld the Minnesota tax deductions in *Mueller,* emphasizing their neutral availability for religious and secular educational expenses and the role of private choice in taking them. *Id.,* at 397— 398. The Court relied on the same two principles in *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986), approving one student's use of a vocational training subsidy for the blind at a religious college, characterizing it as aid to individuals from which religious schools could derive no "large" benefit: "the full benefits of the program [are not] limited, in large part or in whole, to students at sectarian institutions." *Id.,* at 488.

School Dist. of Grand Rapids v. *Ball,* 473 U. S. 373, 395— 396, and n. 13 (1985), overruled in part by *Agostini* v. *Felton,* 521 U. S. 203 (1997), clarified that the notions of evenhandedness neutrality and private choice in *Mueller* did not apply to cases involving direct aid to religious schools, which were still subject to the divertibility test. But in *Agostini,* where the substance of the aid was identical to that in *Ball,* public employees teaching remedial secular classes in private schools, the Court rejected the 30-year-old presumption of divertibility, and instead found it sufficient that the aid "supplement[ed]" but did not "supplant" existing educational services, 521 U. S., at 210, 230. The Court, contrary to *Ball,* viewed the aid as aid "directly to the eligible students . . . no matter where they choose to attend school." 521 U. S., at 229.

In the 12 years between *Ball* and *Agostini,* the Court decided not only *Witters,* but two other cases emphasizing the form of neutrality and private choice over the substance of aid to religious uses, but always in circumstances where any aid to religion was isolated and insubstantial. *Zobrest* v. *Catalina Foothills School Dist.,* 509 U. S. 1 (1993), like *Wit-*695*695 *ters,* involved one student's choice to spend funds from a general public program at a religious school (to pay for a signlanguage interpreter). As in *Witters,* the Court reasoned that "[d]isabled children, not sectarian schools, [were] the primary

beneficiaries . . . ; to the extent sectarian schools benefit at all . . . , they are only incidental beneficiaries." 509 U. S., at 12. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), like *Zobrest* and *Witters,* involved an individual and insubstantial use of neutrally available public funds for a religious purpose (to print an evangelical magazine).

To be sure, the aid in *Agostini* was systemic and arguably substantial, but, as I have said, the majority there chose to view it as a bare "supplement." 521 U. S., at 229. And this was how the controlling opinion described the systemic aid in our most recent case, *Mitchell* v. *Helms,* 530 U. S. 793 (2000), as aid going merely to a "portion" of the religious schools' budgets, *id.,* at 860 (O'Connor, J., concurring in judgment). The plurality in that case did not feel so uncomfortable about jettisoning substance entirely in favor of form, finding it sufficient that the aid was neutral and that there was virtual private choice, since any aid "first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere." *Id.,* at 816. But that was only the plurality view.

Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen formal analysis.

II

Although it has taken half a century since *Everson* to reach the majority's twin standards of neutrality and 696*696 free choice, the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme.

A

Consider first the criterion of neutrality. As recently as two Terms ago, a majority of the Court recognized that neutrality conceived of as evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause, *Mitchell,* 530 U. S., at 838-839 (O'Connor, J., concurring in judgment); *id.,* at 884 (Souter, J., dissenting). But at least in its limited significance, formal neutrality seemed to serve some purpose. Today, however, the majority employs the neutrality criterion in a way that renders it impossible to understand.

Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money. *Id.,* at 809-810 (plurality opinion); *id.,* at 878-884 (Souter, J., dissenting) (three senses of "neutrality").[6] Thus, for example, the aid scheme in *Witters* provided an eligible recipient with a scholarship to be used at any institution within a practically unlimited universe of schools, 474 U. S., at 488; it did not tend to provide more or less aid depending on

which one the scholarship recipient chose, and there was no indication that the maximum scholarship amount would be insufficient at secular 697*697 schools. Neither did any condition of Zobrest's interpreter's subsidy favor religious education. See 509 U. S., at 10.

In order to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions, allowing for as much as $2,250 toward private school tuition (or a grant to a public school in an adjacent district), were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, Ohio Rev. Code Ann. § 3313.976 (West Supp. 2002), but to every provision for educational opportunity: "The program permits the participation of *all* schools within the district, [as well as public schools in adjacent districts], religious or nonreligious." *Ante,* at 653 (emphasis in original). The majority then finds confirmation that "participation of *all* schools" satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, *ante,* at 654, thus showing there is no favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering "*all* schools": public tutors may receive from the State no more than $324 per child to support extra tutoring (that is, the State's 90% of a total amount of $360), App. 166a, whereas the tuition voucher schools (which 698*698 turn out to be mostly religious) can receive up to $2,250, *id.,* at 56a.[7]

Why the majority does not simply accept the fact that the challenge here is to the more generous voucher scheme and judge its neutrality in relation to religious use of voucher money seems very odd. It seems odd, that is, until one recognizes that comparable schools for applying the criterion of neutrality are also the comparable schools for applying the other majority criterion, whether the immediate recipients of voucher aid have a genuinely free choice of religious and secular schools to receive the voucher money. And in applying this second criterion, the consideration of "*all* schools" is ostensibly helpful to the majority position.

B

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public schools among secular alternatives to religious schools. Again, however, the majority

asks the wrong question and misapplies the criterion. The majority has confused choice in spending scholarships with choice from the entire menu of 699*699 possible educational placements, most of them open to anyone willing to attend a public school. I say "confused" because the majority's new use of the choice criterion, which it frames negatively as "whether Ohio is coercing parents into sending their children to religious schools," *ante,* at 655-656, ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents.[8] The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

700*700 Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school. See *supra,* at 697 (noting the same result under the majority's formulation of the neutrality criterion). And because it is unlikely that any participating private religious school will enroll more pupils than the generally available public system, it will be easy to generate numbers suggesting that aid to religion is not the significant intent or effect of the voucher scheme.

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases. In addition to secular private schools (129 students), the majority considers public schools with tuition assistance (roughly 1,400 students), magnet schools (13,000 students), and community schools (1,900 students), and concludes that fewer than 20% of pupils receive state vouchers to attend religious schools. *Ante,* at 659. (In fact, the numbers would seem even more favorable to the majority's argument if enrollment in traditional public schools without tutoring were considered, an alternative the majority thinks relevant to the private choice enquiry, *ante,* at 655.) Justice O'Connor focuses on how much money is spent on each educational option and notes that at most $8.2 million is spent on vouchers for students attending religious schools, *ante,* at 664 (concurring opinion), which is only 6% of the State's expenditure if one includes separate funding for Cleveland's community ($9.4 million) and magnet ($114.8 million) public schools. The variations show how results may shift when a judge can pick and choose the alternatives to use in the comparisons, and they also show what dependably comfortable results the choice criterion 701*701 will yield if the identification of relevant

choices is wide open. If the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a "choice" somewhere that will show the bulk of public spending to be secular. The choice enquiry will be diluted to the point that it can screen out nothing, and the result will always be determined by selecting the alternatives to be treated as choices.

Confining the relevant choices to spending choices, on the other hand, is not vulnerable to comparable criticism. Although leaving the selection of alternatives for choice wide open, as the majority would, virtually guarantees the availability of a "choice" that will satisfy the criterion, limiting the choices to spending choices will not guarantee a negative result in every case. There may, after all, be cases in which a voucher recipient will have a real choice, with enough secular private school desks in relation to the number of religious ones, and a voucher amount high enough to meet secular private school tuition levels. See *infra,* at 704-707. But, even to the extent that choice-to-spend does tend to limit the number of religious funding options that pass muster, the choice criterion has to be understood this way in order, as I have said, for it to function as a limiting principle.[9] Otherwise 702*702 there is surely no point in requiring the choice to be a true or real or genuine one.[10]

703*703 It is not, of course, that I think even a genuine choice criterion is up to the task of the Establishment Clause when substantial state funds go to religious teaching; the discussion in Part III, *infra,* shows that it is not. The point is simply that if the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999-2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. See App. 281a— 286a. Unfortunately for the majority position, there is no explanation for this that suggests the religious direction results simply from free choices by parents. One answer to these statistics, for example, which would be consistent with the genuine choice claimed to be operating, might be that 96.6% of families choosing to avail themselves of vouchers choose to educate their children in schools of their own religion. This would not, in my view, render the scheme constitutional, but it would speak to the majority's choice criterion. 704*704 Evidence shows, however, that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools. App. to Pet. for Cert. in No. 00-1777, p. 147a.[11] The families made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.[12]

Even so, the fact that some 2,270 students chose to apply their vouchers to schools of other religions, App. 281a—286a, might be consistent with true choice if the students "chose" their religious schools over a wide array of private nonreligious options, or if it

could be shown generally that Ohio's program had no effect on educational choices and thus no impermissible effect of advancing religious education. But both possibilities are contrary to fact. First, even if all existing nonreligious private schools in Cleveland were willing to accept large numbers of voucher students, only a few more than the 129 currently enrolled in such schools would be able to attend, as the total enrollment at all nonreligious private schools in Cleveland for kindergarten through eighth grade is only 510 children, see Brief for California Alliance for Public Schools as *Amicus Curiae* 15, and there is no indication that these schools have many open seats.[13] Second, the 705*705 $2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: "nonreligious schools with higher tuition (about $4,000) stated that they could afford to accommodate just a few voucher students."[14] By comparison, the average tuition at participating Catholic schools in Cleveland in 1999-2000 was $1,592, almost $1,000 below the cap.[15]

706*706 Of course, the obvious fix would be to increase the value of vouchers so that existing nonreligious private and nonCatholic religious schools would be able to enroll more voucher students, and to provide incentives for educators to create new such schools given that few presently exist. Private choice, if as robust as that available to the seminarian in *Witters,* would then be "true private choice" under the majority's criterion. But it is simply unrealistic to presume that parents of elementary and middle school students in Cleveland will have a range of secular and religious choices even arguably comparable to the statewide program for vocational and higher education in *Witters.* And to get to that hypothetical point would require that such massive financial support be made available to religion as to disserve every objective of the Establishment Clause even more than the present scheme does. See Part III—B, *infra.*[16]

707*707 There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority's assertion, *ante,* at 654, public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has.[17] For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

III

I do not dissent merely because the majority has misapplied its own law, for even if I assumed *arguendo* that the 708*708 majority's formal criteria were satisfied on the facts, today's conclusion would be profoundly at odds with the Constitution. Proof of this

is clear on two levels. The first is circumstantial, in the now discarded symptom of violation, the substantial dimension of the aid. The second is direct, in the defiance of every objective supposed to be served by the bar against establishment.

A

The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported. Each measure has received attention in previous cases. On one hand, the sheer quantity of aid, when delivered to a class of religious primary and secondary schools, was suspect on the theory that the greater the aid, the greater its proportion to a religious school's existing expenditures, and the greater the likelihood that public money was supporting religious as well as secular instruction. As we said in *Meek,* "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role" as the object of aid that comes in "substantial amounts." 421 U. S., at 365. Cf. *Nyquist,* 413 U. S., at 787-788 (rejecting argument that tuition assistance covered only 15% of education costs, presumably secular, at religious schools). Conversely, the more "attenuated [the] financial benefit . . . that eventually flows to parochial schools," the more the Court has been willing to find a form of state aid permissible. *Mueller,* 463 U. S., at 400.[18]

709*709 On the other hand, the Court has found the gross amount unhelpful for Establishment Clause analysis when the aid afforded a benefit solely to one individual, however substantial as to him, but only an incidental benefit to the religious school at which the individual chose to spend the State's money. See *Witters,* 474 U. S., at 488; cf. *Zobrest,* 509 U. S., at 12. When neither the design nor the implementation of an aid scheme channels a series of individual students' subsidies toward religious recipients, the relevant beneficiaries for establishment purposes, the Establishment Clause is unlikely to be implicated. The majority's reliance on the observations of five Members of the Court in *Witters* as to the irrelevance of substantiality of aid in that case, see *ante,* at 651, is therefore beside the point in the matter before us, which involves considerable sums of public funds systematically distributed through thousands of students attending religious elementary and middle schools in the city of Cleveland.[19]

710*710 The Cleveland voucher program has cost Ohio taxpayers $33 million since its implementation in 1996 ($28 million in voucher payments, $5 million in administrative costs), and its cost was expected to exceed $8 million in the 2001-2002 school year. People for the American Way Foundation, Five Years and Counting: A Closer Look at the Cleveland Voucher Program 1-2 (Sept. 25, 2001) (hereinafter Cleveland Voucher Program) (cited in Brief for National School Boards Association et al. as *Amici Curiae* 9). These tax-raised funds are on top of the textbooks, reading and math tutors, laboratory equipment, and the like that Ohio provides to private schools, worth roughly $600 per child. Cleveland Voucher Program 2.[20]

The gross amounts of public money contributed are symptomatic of the scope of what the taxpayers' money buys for a broad class of religious-school students. In paying for

practically the full amount of tuition for thousands of qualifying students,[21] cf. *Nyquist, supra,* at 781-783 (state aid amounting to 50% of tuition was unconstitutional), the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. The consequences 711*711 of "substantial" aid hypothesized in *Meek* are realized here: the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

B

It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation. I anticipated these objectives earlier, *supra,* at 689-690, in discussing *Everson,* which cataloged them, the first being respect for freedom of conscience. Jefferson described it as the idea that no one "shall be compelled to . . . support any religious worship, place, or ministry whatsoever," A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987), even a "teacher of his own religious persuasion," *ibid.,* and Madison thought it violated by any "`authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.' " Memorial and Remonstrance ¶ 3, reprinted in *Everson,* 330 U. S., at 65-66. "Any tax to establish religion is antithetical to the command that the minds of men always be wholly free," *Mitchell,* 530 U. S., at 871 (Souter, J., dissenting) (internal quotation marks and citations omitted).[22] Madison's objection to three pence has simply been lost in the majority's formalism.

As for the second objective, to save religion from its own corruption, Madison wrote of the "`experience . . . that ecclesiastical 712*712 establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.' " Memorial and Remonstrance ¶ 7, reprinted in *Everson,* 330 U. S., at 67. In Madison's time, the manifestations were "pride and indolence in the Clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution," *ibid.;* in the 21st century, the risk is one of "corrosive secularism" to religious schools, *Ball,* 473 U. S., at 385, and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even "[t]he favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee* v. *Weisman,* 505 U. S. 577, 608 (1992) (Blackmun, J., concurring).

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of . . .religion," Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp. 2002), which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as nonbelievers, §§ 3313.977(A)(1)(c)—(d). This indeed was the exact object of a 1999 amendment repealing the portion of a predecessor statute that had allowed an admission preference for "[c]hildren . . . whose parents are affiliated with any organization that provides financial support to the school, at the discretion of

the school." § 3313.977(A)(1)(d) (West 1999). Nor is the State's religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming 713*713 equal qualification for the job.[23] Cf. National Catholic Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001) ("31% of [reporting Catholic elementary and middle] schools had at least one full-time teacher who was a religious sister"). Indeed, a separate condition that "[t]he school . . . not . . . teach hatred of any person or group on the basis of . . . religion," § 3313.976(A)(6) (West Supp. 2002), could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others,[24] if they want government money for their schools.

714*714 For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow. Prior examples of aid, whether grants through individuals or in-kind assistance, were never significant enough to alter the basic fiscal structure of religious schools; state aid was welcome, but not indispensable. See, *e. g., Mitchell,* 530 U. S., at 802 (federal funds could only supplement funds from nonfederal sources); *Agostini,* 521 U. S., at 210 (federally funded services could "`supplement, and in no case supplant, the level of services' " already provided). But given the figures already involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income. See, *e. g.,* People for the American Way Foundation, A Painful Price 5, 9, 11 (Feb. 14, 2002) (of 91 schools participating in the Milwaukee program, 75 received voucher payments in excess of tuition, 61 of those were religious and averaged $185,000 worth of overpayment per school, justified in part to "raise low salaries"). The administrators of those same schools are also no doubt following the politics of a move in the Ohio State Senate to raise the current maximum value of a school voucher from $2,250 to the base amount of current state spending on each public school student ($4,814 for the 2001 fiscal year). See Bloedel, Bill Analysis of S. B. No. 89, 124th Ohio Gen. Assembly, regular session 2001-2002 (Ohio Legislative Service Commission). Ohio, in fact, is merely replicating the experience in Wisconsin, where a similar increase in the value of educational vouchers in Milwaukee has induced the creation of some 23 new private schools, Public Policy Forum, Research Brief, vol. 90, no. 1, p. 3 (Jan. 23, 2002), some of which, we may safely surmise, are religious. New schools have presumably 715*715 pegged their financial prospects to the government from the start, and the odds are that increases in government aid will bring the threshold voucher amount closer to the tuition at even more expensive religious schools.

When government aid goes up, so does reliance on it; the only thing likely to go down is independence. If Justice Douglas in *Allen* was concerned with state agencies, influenced by powerful religious groups, choosing the textbooks that parochial schools would use, 392 U. S., at 265 (dissenting opinion), how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculums? A day will come when

religious schools will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. See *Mitchell, supra,* at 872 (Souter, J., dissenting); *Everson,* 330 U. S., at 8-11. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord. "Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another." *Id.,* at 53. (Rutledge, J., dissenting).

Justice Breyer has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer 716*716 expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty.[25] Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element.[26] Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes,[27] or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention.[28] Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

* * *

If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action 717*717 of the political branches at the state and national levels. Legislatures not driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. Perhaps even cities with problems like Cleveland's will perceive the danger, now that they know a federal court will not save them from it.

My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority's decision.

Everson's statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle.

Justice Breyer, with whom Justice Stevens and Justice Souter join, dissenting.

I join Justice Souter's opinion, and I agree substantially with Justice Stevens. I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, "parental choice" cannot significantly alleviate the constitutional problem. See Part IV, *infra*.

I

The First Amendment begins with a prohibition, that "Congress shall make no law respecting an establishment of 718*718 religion," and a guarantee, that the government shall not prohibit "the free exercise thereof." These Clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to "worship God in their own way," and allows all families to "teach their children and to form their characters" as they wish. C. Radcliffe, The Law & Its Compass 71 (1960). The Clauses reflect the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe. See, *e. g.,* Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969) (religious strife was "one of the principal evils that the first amendment sought to forestall"); B. Kosmin & S. Lachman, One Nation Under God: Religion in Contemporary American Society 24 (1993) (First Amendment designed in "part to prevent the religious wars of Europe from entering the United States"). Whatever the Framers might have thought about particular 18th-century school funding practices, they undeniably intended an interpretation of the Religion Clauses that would implement this basic First Amendment objective.

In part for this reason, the Court's 20th-century Establishment Clause cases—both those limiting the practice of religion in public schools and those limiting the public funding of private religious education—focused directly upon social conflict, potentially created when government becomes involved in religious education. In *Engel* v. *Vitale,* 370 U. S. 421 (1962), the Court held that the Establishment Clause forbids prayer in public elementary and secondary schools. It did so in part because it recognized the "anguish, hardship and bitter strife that could come when zealous religious groups

struggl[e] with one another to obtain the Government's stamp of approval . . . ." *Id.,* at 429. And it added:

"The history of governmentally established religion, both in England and in this country, showed that whenever 719*719 government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Id.,* at 431.

See also *Lee* v. *Weisman,* 505 U. S. 577, 588 (1992) (striking down school-sanctioned prayer at high school graduation ceremony because "potential for divisiveness" has "particular relevance" in school environment); *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203, 307 (1963) (Goldberg, J., concurring) (Bible-reading program violated Establishment Clause in part because it gave rise "to those very divisive influences and inhibitions of freedom" that come with government efforts to impose religious influence on "young impressionable [school] children").

In *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971), the Court held that the Establishment Clause forbids state funding, through salary supplements, of religious school teachers. It did so in part because of the "threat" that this funding would create religious "divisiveness" that would harm "the normal political process." *Id.,* at 622. The Court explained:

"[P]olitical debate and division . . . are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which [the First Amendment's religious clauses were] . . . intended to protect." *Ibid.*

And in *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 794 (1973), the Court struck down a state statute that, much like voucher programs, provided aid for parents whose children attended religious schools, explaining that the "assistance of the sort here involved carries grave potential for . . . continuing political strife over aid to religion."

When it decided these 20th-century Establishment Clause cases, the Court did not deny that an earlier American society 720*720 might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. See, *e. g.,* D. Tyack, Onward Christian Soldiers: Religion in the American Common School, in History and Education 217-226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. See Kosmin & Lachman, *supra,* at 45 (Catholics constituted less than 2% of American church-affiliated population at time of founding).

The 20th-century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million. Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 299-300 (Nov. 2001). There were similar percentage increases in the Jewish population. Kosmin & Lachman, *supra,* at 45-46. Not surprisingly, with this increase in numbers, members of nonProtestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, *supra,* at 300. "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, Separation of Church and State 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . .. rioted over whether Catholic children could be 721*721 released from the classroom during Bible reading." Jeffries & Ryan, 100 Mich. L. Rev., at 300.

The 20th-century Court was also aware that political efforts to right the wrong of discrimination against religious minorities in primary education had failed; in fact they had exacerbated religious conflict. Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be `nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support `sectarian' schools (which in practical terms meant Catholic)." *Id.,* at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i. e.,* Catholic) schooling for children. *Id.,* at 301-305. See also Hamburger, *supra,* at 287.

These historical circumstances suggest that the Court, applying the Establishment Clause through the Fourteenth Amendment to 20th-century American society, faced an interpretive dilemma that was in part practical. The Court appreciated the religious diversity of contemporary American society. See *Schempp, supra,* at 240 (Brennan, J., concurring). It realized that the status quo favored some religions at the expense of others. And it understood the Establishment Clause to prohibit (among other things) any such favoritism. Yet *how* did the Clause achieve that objective? Did it simply require the government to give each religion an equal chance to introduce religion into the primary schools—a kind of "equal opportunity" approach to the interpretation of the Establishment Clause? Or, did that Clause avoid government favoritism of some religions by insisting upon "separation"—that the government achieve 722*722 equal treatment by removing itself from the business of providing religious education for children? This interpretive choice arose in respect both to religious activities in public schools and government aid to private education.

In both areas the Court concluded that the Establishment Clause required "separation," in part because an "equal opportunity" approach was not workable. With respect to

religious activities in the public schools, how could the Clause require public primary and secondary school teachers, when reading prayers or the Bible, *only* to treat all religions alike? In many places there were too many religions, too diverse a set of religious practices, too many whose spiritual beliefs denied the virtue of formal religious training. This diversity made it difficult, if not impossible, to devise meaningful forms of "equal treatment" by providing an "equal opportunity" for all to introduce their own religious practices into the public schools.

With respect to government aid to private education, did not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife? As Justice Rutledge recognized:

"Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one [religious sect] by numbers [of adherents] alone will benefit most, there another. This is precisely the history of societies which have had an established religion and dissident groups." *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 53-54 (1947) (dissenting opinion).

The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public 723*723 schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.

II

The principle underlying these cases—avoiding religiously based social conflict—remains of great concern. As religiously diverse as America had become when the Court decided its major 20th-century Establishment Clause cases, we are exponentially more diverse today. America boasts more than 55 different religious groups and subgroups with a significant number of members. Graduate Center of the City University of New York, B. Kosmin, E. Mayer, & A. Keysar, American Religious Identification Survey 12-13 (2001). Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. *Ibid.* And several of these major religions contain different subsidiary sects with different religious beliefs. See Lester, Oh, Gods!, The Atlantic Monthly 37 (Feb. 2002). Newer Christian immigrant groups are "expressing their Christianity in languages, customs, and independent churches that are barely recognizable, and often controversial, for Europeanancestry Catholics and Protestants." H. Ebaugh & J. Chafetz, Religion and the New Immigrants: Continuities and Adaptations in Immigrant Congregations 4 (abridged student ed. 2002).

Under these modern-day circumstances, how is the "equal opportunity" principle to work—without risking the "struggle of sect against sect" against which Justice Rutledge warned? School voucher programs finance the religious education of the young. And, if

widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, 724*724 whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Consider the voucher program here at issue. That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so? The program also insists that no participating school "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Ohio Rev. Code Ann. § 3313.976(A)(6) (West Supp. 2002). And it requires the State to "revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation" of the program's rules. § 3313.976(B). As one *amicus* argues, "it is difficult to imagine a more divisive activity" than the appointment of state officials as referees to determine whether a particular religious doctrine "teaches hatred or advocates lawlessness." Brief for National Committee for Public Education and Religious Liberty as *Amicus Curiae* 23.

How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest—say, the conflict in the Middle East or the war on terrorism? Yet any major funding program 725*725 for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive. Efforts to respond to these problems not only will seriously entangle church and state, see *Lemon*, 403 U. S., at 622, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government.

I recognize that other nations, for example Great Britain and France, have in the past reconciled religious school funding and religious freedom without creating serious strife. Yet British and French societies are religiously more homogeneous—and it bears noting that recent waves of immigration have begun to create problems of social division there as well. See, *e. g.,* The Muslims of France, 75 Foreign Affairs 78 (1996) (describing increased religious strife in France, as exemplified by expulsion of teenage girls from school for wearing traditional Muslim scarves); Ahmed, Extreme Prejudice; Muslims in

Britain, The Times of London, May 2, 1992, p. 10 (describing religious strife in connection with increased Muslim immigration in Great Britain).

In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits. See, *e. g.,* Webster, On the Education of Youth in America (1790), in Essays on Education in the Early Republic 43, 53, 59 (F. Rudolph ed. 1965) ("[E]ducation of youth" is "of more consequence than making laws and preaching the gospel, because it lays the foundation on which both law and gospel rest for success"); Pope Paul VI, Declaration on Christian Education (1965) ("[T]he Catholic school can be such an aid to the fulfillment of the mission of the People of God and to the fostering of dialogue between 726*726 the Church and mankind, to the benefit of both, it retains even in our present circumstances the utmost importance").

III

I concede that the Establishment Clause currently permits States to channel various forms of assistance to religious schools, for example, transportation costs for students, computers, and secular texts. See *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1 (1947); *Mitchell* v. *Helms,* 530 U. S. 793 (2000). States now certify the nonsectarian educational content of religious school education. See, *e. g., New Life Baptist Church Academy* v. *East Longmeadow,* 885 F. 2d 940 (CA1 1989). Yet the consequence has not been great turmoil. But see, *e. g.,* May, Charter School's Religious Tone; Operation of South Bay Academy Raises Church-State Questions, San Francisco Chronicle, Dec. 17, 2001, p. A1 (describing increased government supervision of charter schools after complaints that students were "studying Islam in class and praying with their teachers," and Muslim educators complaining of "`post-Sept. 11 anti-Muslim sentiment' ").

School voucher programs differ, however, in both *kind* and *degree* from aid programs upheld in the past. They differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children. For that reason the constitutional demand for "separation" is of particular constitutional concern. See, *e. g., Weisman,* 505 U. S., at 592 ("heightened concerns" in context of primary education); *Edwards* v. *Aguillard,* 482 U. S. 578, 583— 584 (1987) ("Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools").

Private schools that participate in Ohio's program, for example, recognize the importance of primary religious education, for they pronounce that their goals are to "communicate the gospel," "provide opportunities to . . . experience a faith community," "provide . . . for growth in prayer," and "provide 727*727 instruction in religious truths and values." App. 408a, 487a. History suggests, not that such private school teaching of religion is undesirable, but that *government funding* of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers,

vocational training, or even funding for adults who wish to obtain a college education at a religious university. See *supra,* at 720-722. Contrary to Justice O'Connor's opinion, *ante,* at 665-666 (concurring opinion), history also shows that government involvement in religious primary education is far more divisive than state property tax exemptions for religious institutions or tax deductions for charitable contributions, both of which come far closer to exemplifying the neutrality that distinguishes, for example, fire protection on the one hand from direct monetary assistance on the other. Federal aid to religiously based hospitals, *ante,* at 666 (O'Connor, J., concurring), is even further removed from education, which lies at the heartland of religious belief.

Vouchers also differ in *degree.* The aid programs recently upheld by the Court involved limited amounts of aid to religion. But the majority's analysis here appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools. That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem. State aid that takes the form of peripheral secular items, with prohibitions against diversion of funds to religious teaching, holds significantly less potential for social division. In this respect as well, the secular aid upheld in *Mitchell* differs dramatically from the present case. Although it was conceivable that minor amounts of money could have, contrary to the statute, found their way to the religious activities of the recipients, see 530 U. S., at 864 (O'Connor, J., concurring in judgment), that case is at worst the camel's nose, while the litigation before us is the camel itself.

728*728 IV

I do not believe that the "parental choice" aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division that Part II, *supra,* describes. Consequently, the fact that the parent may choose which school can cash the government's voucher check does not alleviate the Establishment Clause concerns associated with voucher programs.

V

The Court, in effect, turns the clock back. It adopts, under the name of "neutrality," an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding overcomes the Establishment Clause

concern for social concord. An earlier Court found that "equal opportunity" principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education. See *Nyquist*, 413 U. S., at 783. In a society composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of religiously 729*729 based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, and for reasons set forth by Justice Souter and Justice Stevens, I respectfully dissent.

[*] Together with No. 00-1777, *Hanna Perkins School et al.* v. *SimmonsHarris et al.*, and No. 00-1779, *Taylor et al.* v. *Simmons-Harris et al.*, also on certiorari to the same court.

[†] Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, *Thomas E. Warner*, Solicitor General, and *Matthew J. Conigliaro*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Don Stenberg* of Nebraska, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, and *Randolph A. Beales* of Virginia; for the State of Wisconsin by *Stephen P. Hurley, Gordon P. Giampietro,* and *Donald A. Daugherty, Jr.;* for Gary E. Johnson, Governor of New Mexico, by *Jeffrey S. Bucholtz;* for Mayor Rudolph W. Giuliani et al. by *Michael D. Hess,* Corporation Counsel of the City of New York, *Leonard J. Koerner,* and *Edward F. X. Hart;* for Councilwoman Fannie Lewis by *Steffen N. Johnson, Stephen M. Shapiro, Robert M. Dow, Jr.,* and *Richard P. Hutchison;* for the American Education Reform Council by *Louis R. Cohen, C. Boyden Gray,* and *Todd Zubler;* for the American Civil Rights Union by *Peter J. Ferrara;* for the American Center for Law and Justice, Inc., et al. by *Jay Alan Sekulow, James M. Henderson, Sr., Colby M. May, Vincent McCarthy,* and *Walter M. Weber;* for the Association of Christian Schools International et al. by *Edward McGlynn Gaffney, Jr.,* and *Richard A. Epstein;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson, Eric W. Treene, Roman P. Storzer, Anthony R. Picarello, Jr.,* and *Richard Garnett;* for the Black Alliance for Educational Options by *Samuel Estreicher;* for the Catholic League for Religious and Civil Rights by *Robert P. George;* for the Center for Education Reform et al. by *Robert A. Destro* and *Joseph E. Schmitz;* for the Center for Individual Freedom et al. by *Erik S. Jaffe;* for Children First America et al. by *Harold J. (Tex) Lezar, Jr.,* and *Stephen G. Gilles;* for the Christian Legal Society et al. by *Stuart J. Lark* and *Gregory S. Baylor;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Coalition for Local Sovereignty by *Kenneth B. Clark;* for the National Association of Independent Schools by *Allen G. Siegel;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin, Dennis Rapps, Nathan Diament,* and *David Zwiebel;* for the REACH Alliance by *Philip J. Murren;* for the Rutherford Institute by *John W. Whitehead, Steven H. Aden, Robert R. Melnick,* and *James J. Knicely;* for the Solidarity Center for Law and Justice, P. C., by *James P. Kelly III;* for the United States Conference of Catholic Bishops by *Mark E. Chopko, John Liekweg,* and *Jeffrey Hunter Moon;* and for *Hugh Calkins, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Howard G. Kristol, Erwin Chemerinsky, Jeffrey P. Sinensky, Kara H. Stein, Arthur H. Bryant,* and *Victoria W. Ni;* for the Anti-Defamation League by *Martin E. Karlinsky, Daniel J. Beller, Steven M. Freeman,* and *Frederick M. Lawrence;* for the Council on Religious Freedom et al. by *Lee Boothby* and *Alan J. Reinach;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Norman J. Chachkin, Elaine R. Jones, Theodore M. Shaw, James L. Cott, Dennis D. Parker,* and *Dennis Courtland Hayes;* for the National Committee for Public Education and Religious Liberty by *Geoffrey F. Aronow* and *Stanley Geller;* for the National School Boards Association et al. by *Julie K. Underwood, Scott Bales,* and *James Martin;* for the Ohio Association for Public Education and Religious Liberty by *Patrick Farrell Timmins, Jr.;* and for the Ohio School Boards Association et al. by *Kimball H. Carey* and *Susan B. Greenberger.*

Briefs of *amici curiae* were filed for the California Alliance for Public Schools by *Robin B. Johansen* and *Joseph Remcho;* for Vermonters for Better Education by *Michael D. Dean;* for John E. Coons et al. by *Mr.*

Coons, pro se, and *Stephen D. Sugarman, pro se;* for Jesse H. Choper et al. by *Mr. Choper, pro se, William Bassett, Teresa Collett, David Forte, Richard Garnett, Lino Graglia, Michael Heise, Gail Heriot, Roderick Hills, Grant Nelson, Michael Perry, David Post, Charles Rice, Rosemary Salomone, Gregory Sisk, Steve Smith,* and *Harry Tepker;* and for Ira J. Paul et al. by *Sharon L. Browne.*

[1] Although the parties dispute the precise amount of state funding received by suburban school districts adjacent to the Cleveland City School District, there is no dispute that any suburban district agreeing to participate in the program would receive a $2,250 tuition grant *plus* the ordinary allotment of per-pupil state funding for each program student enrolled in a suburban public school. See Brief for Respondents Simmons-Harris et al. 30, n. 11 (suburban schools would receive "on average, approximately, $4,750" per program student); Brief for Petitioners in No. 00-1779, p. 39 (suburban schools would receive "about $6,544" per program student).

[2] The number of available scholarships per covered districtis determined annually by the Ohio Superintendent for Public Instruction. §§ 3313.978(A)—(B).

[3] Justice Souter suggests the program is not "neutral" because program students cannot spend scholarship vouchers at traditional public schools. *Post,* at 697-698 (dissenting opinion). This objection is mistaken: Public schools in Cleveland already receive $7,097 in public funding per pupil—$4,167 of which is attributable to the State. App. 56a. Program students who receive tutoring aid and remain enrolled in traditional public schools therefore direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school. *Ibid.* Justice Souter does not seriously claim that the program differentiates based on the religious status of beneficiaries or providers of services,the touchstone of neutrality under the Establishment Clause. *Mitchell* v. *Helms,* 530 U. S. 793, 809 (2000) (plurality opinion); *id.,* at 838 (O'Connor, J., concurring in judgment).

[4] Justice Souter appears to base this claim on the unfounded assumption that capping the amount of tuition charged to low-income students (at $2,500) favors participation by religious schools. *Post,* at 704-705 (dissenting opinion). But elsewhere he claims that the program spends *too much* money on private schools and chides the state legislature for even proposing to raise the scholarship amount for low-income recipients. *Post,* at 697-698, 710-711, 714-715. His assumption also finds no support in the record, which shows that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions. App. 194a—195a; App. to Pet. for Cert. in No. 00-1777, p. 119a. Indeed, the actual operation of the program refutes Justice Souter's argument that few but religious schools can afford to participate: Ten secular private schools operated within the Cleveland City School District when the program was adopted. Reply Brief for Petitioners in No. 00-1777, p. 4 (citing Ohio Educational Directory, 1999-2000 School Year, Alphabetic List of Nonpublic Schools, Ohio Dept. of Ed.). All 10 chose to participate in the program and have continued to participate to this day. App. 281a—286a. And while no religious schools have been created in response to the program, several *nonreligious* schools have been created, *id.,* at 144a—148a, 224a—225a, in spite of the fact that a principal barrier to entry of new private schools is the uncertainty caused by protracted litigation which has plagued the program since its inception, *post,* at 672 (O'Connor, J., concurring) (citing App. 225a, 227a). See also 234 F. 3d 945, 970 (CA6 2000) (Ryan, J., concurring in part and dissenting in part) ("There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program because it cannot `afford' to do so"). Similarly mistaken is Justice Souter's reliance on the low enrollment of scholarship students in nonreligious schools during the 1999-2000 school year. *Post,* at 704 (citing Brief for California Alliance for Public Schools as *Amicus Curiae* 15). These figures ignore the fact that the number of program students enrolled in nonreligious schools has widely varied from year to year, *infra,* at 659; *e. g.,* n. 5, *infra,* underscoring why the constitutionality of a neutral choice program does not turn on annual tallies of private decisions made in any given year by thousands of individual aid recipients, *infra,* at 659 (citing *Mueller* v. *Allen,* 463 U. S. 388, 401 (1983)).

[5] The fluctuations seen in the Cleveland program are hardly atypical. Experience in Milwaukee, which since 1991 has operated an educational choice program similar to the Ohio program, demonstrates that the mix of participating schools fluctuates significantly from year to year based on a number of factors,

one of which is the uncertainty caused by persistent litigation. See App. 218a, 229a—236a; Brief for State of Wisconsin as *Amicus Curiae* 10-13 (hereinafter Brief for Wisconsin) (citing Wisconsin Dept. of Public Instruction, Milwaukee Parental Choice Program Facts and Figures for 2001-2002). Since the Wisconsin Supreme Court declared the Milwaukee program constitutional in 1998, *Jackson* v. *Benson*, 218 Wis. 2d 835, 578 N. W. 2d 602, several nonreligious private schools have entered the Milwaukee market, and now represent 32% of all participating schools. Brief for Wisconsin 11-12. Similarly, the number of program students attending nonreligious private schools increased from 2,048 to 3,582; these students now represent 33% of all program students. *Id.,* at 12-13. There are currently 34 nonreligious private schools participating in the Milwaukee program, a nearly five-fold increase from the 7 nonreligious schools that participated when the program began in 1990. See App. 218a; Brief for Wisconsin 12. And the total number of students enrolled in nonreligious schools has grown from 337 when the program began to 3,582 in the most recent school year. See App. 218a, 234a—236a; Brief for Wisconsin 12-13. These numbers further demonstrate the wisdom of our refusal in *Mueller* v. *Allen*, 463 U. S., at 401, to make the constitutionality of such a program depend on "annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

[6] Justice Souter and Justice Stevens claim that community schools and magnet schools are separate and distinct from program schools, simply because the program itself does not include community and magnet school options. *Post,* at 698-701 (Souter, J., dissenting); *post,* at 685 (Stevens, J., dissenting). But none of the dissenting opinions explain how there is any perceptible difference between scholarship schools, community schools, or magnet schools from the perspective of Cleveland parents looking to choose the best educational option for their school-age children. Parents who choose a program school in fact receive from the State precisely what parents who choose a community or magnet school receive—the opportunity to send their children largely at state expense to schools they prefer to their local public school. See, *e. g.,* App. 147a, 168a—169a; App. in Nos. 00-3055, etc. (CA6), pp. 1635-1645 and 1657-1673 (Cleveland parents who enroll their children in schools other than local public schools typically explore all state-funded options before choosing an alternative school).

[7] Justice Breyer would raise the invisible specters of "divisiveness" and "religious strife" to find the program unconstitutional. *Post,* at 719, 725-728 (dissenting opinion). It is unclear exactly what sort of principle Justice Breyer has in mind, considering that the program has ignited no "divisiveness" or "strife" other than this litigation. Nor is it clear where Justice Breyer would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find "divisive." We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs. *Mitchell* v. *Helms*, 530 U. S., at 825 (plurality opinion) ("The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded") (citing cases); *id.,* at 825-826 ("`It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit' " (quoting *Aguilar* v. *Felton*, 473 U. S. 402, 429 (1985) (O'Connor, J., dissenting))).

[1] The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894, in 5 The Frederick Douglass Papers 623 (J. Blassingame & J. McKivigan eds. 1992) (hereinafter Douglass Papers).

[2] See, *e. g.,* *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 309-310 (1963) (Stewart, J., dissenting) ("[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments"); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 113 (1985) (Rehnquist, J., dissenting).

[3] Several Justices have suggested that rights incorporated through the Fourteenth Amendment apply in a different manner to the States than they do to the Federal Government. For instance, Justice Jackson stated, "[t]he inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms." *Beauharnais* v. *Illinois*, 343 U. S. 250, 294 (1952) (dissenting opinion). Justice Harlan noted: "The Constitution differentiates between

those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal." *Roth* v. *United States*, 354 U. S. 476, 503-504 (1957) (dissenting opinion). See also *Gitlow* v. *New York*, 268 U. S. 652, 672 (1925) (Holmes, J., dissenting).

[4] In particular, these rights inhere in the Free Exercise Clause, which unlike the Establishment Clause protects individual liberties of religious worship. "That the central value embodied in the First Amendment— and, more particularly, in the guarantee of `liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized." *Schempp, supra,* at 312 (Stewart, J., dissenting). See also Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1159 (1991) ("[T]he free exercise clause was paradigmatically about citizen rights, not state rights; it thus invites incorporation. Indeed, this clause was specially concerned with the plight of minority religions, and thus meshes especially well with the minorityrights thrust of the Fourteenth Amendment"); Lietzau, Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation, 39 DePaul L. Rev. 1191, 1206-1207 (1990).

[5] This Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children. "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." *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925). But see *Troxel* v. *Granville*, 530 U. S. 57, 80 (2000) (Thomas, J., concurring in judgment).

[6] See, *e. g.,* N. Edwards, School in the American Social Order: The Dynamics of American Education 360-362 (1947).

[7] Minority and low-income parents express the greatest support for parental choice and are most interested in placing their children in private schools. "[T]he appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts: precisely the parents who are the most disadvantaged under the current system." T. Moe, Schools, Vouchers, and the American Public 164 (2001). Nearly three-fourths of all public school parents with an annual income less than $20,000 support vouchers, compared to 57 percent of public school parents with an annual income of over $60,000. See *id.,* at 214 (Table 7-3). In addition, 75 percent of black public school parents support vouchers, as do 71 percent of Hispanic public school parents. *Ibid.*

[8] In 1997, approximately 68 percent of prisoners in state correctional institutions did not have a high school degree. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics2000, p. 519 (Table 6.38).

[9] These programs include tax credits for such schooling. In addition, 37 States have some type of charter school law. See School Choice 2001: What's Happening in the States xxv (R. Moffitt, J. Garrett, & J. Smith eds. 2001) (Table 1).

[10] Douglass Papers 623.

[1] Ohio is currently undergoing a major overhaul of its public school financing pursuant to an order of the Ohio Supreme Court in *DeRolph* v. *State*, 93 Ohio St. 3d 309, 754 N. E. 2d 1184 (2001). The Court ought, at least, to allow that reform effort and the district's experimentation with alternative public schools to take effect before relying on Cleveland's educational crisis as a reason for state financed religious education.

[2] The Court suggests that an education at one of the district's community or magnet schools is provided "largely at state expense." *Ante,* at 660, n. 6. But a public education at either of these schools is provided *entirely* at state expense—as the State is required to do.

[1] "Congress shall make no law respecting an establishment of religion," U. S. Const., Amdt. 1.

[2] See, *e. g.,* App. 319a (Saint Jerome School Parent and Student Handbook 1999-2000, p. 1) ("FAITH must dominate the entire educational process so that the child can make decisions according to Catholic values and choose to lead a Christian life"); *id.,* at 347a (Westside Baptist Christian School Parent-Student Handbook, p. 7) ("Christ is the basis of all learning. All subjects will be taught from the Biblical perspective that all truth is God's truth").

[3] See *Everson,* 330 U. S., at 54, n. 47 (noting that similar programs had been struck down in six States, upheld in eight, and *amicus curiae* briefs filed by "three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York").

[4] The Court noted that "the record contains no evidence that any of the private schools . . . previously provided textbooks for their students," and "[t]here is some evidence that at least some of the schools did not." *Allen,* 392 U. S., at 244, n. 6. This was a significant distinction: if the parochial schools provided secular textbooks to their students, then the State's provision of the same in their stead might have freed up church resources for allocation to other uses, including, potentially, religious indoctrination.

[5] The Court similarly rejected a path argument in *Wolman* v. *Walter,* 433 U. S. 229 (1977), overruled by *Mitchell* v. *Helms,* 530 U. S. 793 (2000), where the State sought to distinguish *Meek* v. *Pittenger,* 421 U. S. 349 (1975), overruled by *Mitchell, supra,* based on the fact that, in *Meek,* the State had lent educational materials to individuals rather than to schools. "Despite the technical change in legal bailee," the Court explained, "the program in substance is the same as before," and "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek.* " *Wolman, supra,* at 250. Conversely, the Court upheld a law reimbursing private schools for state-mandated testing, dismissing a proffered distinction based on the indirect path of aid in an earlier case as "a formalistic dichotomy that bears . .. little relationship either to common sense or to the realities of school finance." *Committee for Public Ed. and Religious Liberty* v. *Regan,* 444 U. S. 646, 658 (1980).

[6] Justice O'Connor apparently no longer distinguishes between this notion of evenhandedness neutrality and the free-exercise neutrality in *Everson.* Compare *ante,* at 669 (concurring opinion), with *Mitchell,* 530 U. S., at 839 (opinion concurring in judgment) ("Even if we at one time used the term `neutrality' in a descriptive sense to refer to those aid programs characterized by the requisite equipoise between support of religion and antagonism to religion, Justice Souter's discussion convincingly demonstrates that the evolution in the meaning of the term in our jurisprudence is cause to hesitate before equating the neutrality of recent decisions with the neutrality of old").

[7] The majority's argument that public school students within the program "direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school," *ante,* at 654, n. 3, was decisively rejected in *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 782-783, n. 38 (1973): "We do not agree with the suggestion . . . that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. . . . The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools `totally at state expense.' And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools— a result wholly at variance with the Establishment Clause."

[8] In some earlier cases, "private choice" was sensibly understood to go beyond the mere formalism of path, to ensure that aid was neither systemic nor predestined to go to religious uses. Witters, for example, had a virtually unlimited choice among professional training schools, only a few of which were religious; and Zobrest was simply one recipient who chose to use a government-funded interpreter at a religious school over a secular school, either of which was open to him. But recent decisions seem to have stripped away any substantive bite, as "private choice" apparently means only that government aid follows individuals to religious schools. See, *e. g.,* Agostini v. Felton, 521 U. S. 203, 229 (1997) (state aid for remedial instruction at a religious school goes "directly to the eligible students . . . no matter where they choose to attend school").

[9] The need for a limit is one answer to Justice O'Connor, who argues at length that community schools should factor in the "private choice" calculus. *Ante,* at 672-673 (concurring opinion). To be fair, community schools do exhibit some features of private schools: they are autonomously managed without any interference from the school district or State and two have prior histories as private schools. It may be, then, that community schools might arguably count as choices because they are not like other public schools run by the State or municipality, but in substance merely private schools with state funding outside the voucher program.

But once any public school is deemed a relevant object of choice, there is no stopping this progression. For example, both the majority and Justice O'Connor characterize public magnet schools as an independent category of genuine educational options, simply because they are "nontraditional" public schools. But they do not share the "private school" features of community schools, and the only thing that distinguishes them from "traditional" public schools is their thematic focus, which in some cases appears to be nothing more than creative marketing. See, *e. g.,* Cleveland Municipal School District, Magnet and Thematic Programs/ Schools (including, as magnet schools, "[f]undamental [e]ducation [c]enters," which employ "[t]raditional classrooms and teaching methods with an emphasis on basic skills"; and "[a]ccelerated [l]earning" schools, which rely on "[i]nstructional strategies [that] provide opportunities for students to build on individual strengths, interests and talents").

[10] And how should we decide which "choices" are "genuine" if the range of relevant choices is theoretically wide open? The showcase educational options that the majority and Justice O'Connor trumpet are Cleveland's 10 community schools, but they are hardly genuine choices. Two do not even enroll students in kindergarten through third grade, App. 162a, and thus parents contemplating participation in the voucher program cannot select those schools. See Ohio Rev. Code Ann. § 3313.975(C)(1) (West Supp. 2002) ("[N]o new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three"). One school was not "in operation" as of 1999, and in any event targeted students below the federal poverty line, App. 162a, not all voucher-eligible students, see n. 21, *infra.* Another school was a special population school for students with "numerous suspensions, behavioral problems and who are a grade level below their peers," App. 162a, which, as Justice O'Connor points out, may be "more attractive to certain inner-city parents," *ante,* at 674, but is probably not an attractive "choice" for most parents.

Of the six remaining schools, the most recent statistics on fourth-grade student performance (unavailable for one school) indicate: three scored well below the Cleveland average in each of five tested subjects on state proficiency examinations, one scored above in one subject, and only one community school, Old Brooklyn Montessori School, was even an arguable competitor, scoring slightly better than traditional public schools in three subjects, and somewhat below in two. See Ohio Dept. of Ed., 2002 Community School Report Card, Hope Academy, Lincoln Park, p. 5; *id.,* Hope Academy, Cathedral Campus, at 5; *id.,* Hope Academy, Chapelside Campus, at 5; *id.,* Hope Academy, Broadway Campus, at 5; *id.,* Old Brooklyn Montessori School, at 5; 2002 District Report Card, Cleveland Municipal School District, p. 1. These statistics are consistent with 1999 test results, which were only available for three of the schools. Brief for Ohio School Boards Association et al. as *Amici Curiae* 26-28 (for example, 34.3% of students in the Cleveland City School District were proficient in math, as compared with 3.3% in Hope Chapelside and 0% in Hope Cathedral).

I think that objective academic excellence should be the benchmark in comparing schools under the majority's test; Justice O'Connor prefers comparing educational options on the basis of subjective "parental satisfaction," *ante,* at 675, and I am sure there are other plausible ways to evaluate "genuine choices." Until now, our cases have never talked about the quality of educational options by whatever standard, but now that every educational option is a relevant "choice," this is what the "genuine and independent private choice" enquiry, *ante,* at 652 (opinion of the Court), would seem to require if it is to have any meaning at all. But if that is what genuine choice means, what does this enquiry have to do with the Establishment Clause?

[11] For example, 40% of families who sent their children to private schools for the first time under the voucher program were Baptist, App. 118a, but only one school, enrolling 44 voucher students, is Baptist, *id.,* at 284a.

[12] When parents were surveyed as to their motives for enrolling their children in the voucher program, 96.4% cited a better education than available in the public schools, and 95% said their children's safety. *Id.,* at 69a—70a. When asked specifically in one study to identify the most important factor in selecting among participating private schools, 60% of parents mentioned academic quality, teacher quality, or the substance of what is taught (presumably secular); only 15% mentioned the religious affiliation of the school as even a consideration. *Id.,* at 119a.

[13] Justice O'Connor points out that "there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program." *Ante,* at 671. But there is equally no evidence to support her assertion that "many parents with vouchers selected nonreligious private schools over religious alternatives," *ibid.,* and in fact the evidence is to the contrary, as only 129 students used vouchers at private nonreligious schools.

[14] General Accounting Office Report No. 01-914, School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee 25 (Aug. 2001) (GAO Report). Of the 10 nonreligious private schools that "participate" in the Cleveland voucher program, 3 currently enroll no voucher students. And of the remaining seven schools, one enrolls over half of the 129 students that attend these nonreligious schools, while only two others enroll more than 8 voucher students. App. 281a—286a. Such schools can charge full tuition to students whose families do not qualify as "low income," but unless the number of vouchers are drastically increased, it is unlikely that these students will constitute a large fraction of voucher recipients, as the program gives preference in the allocation of vouchers to low-income children. See Ohio Rev. Code Ann. § 3313.978(A) (West Supp. 2002).

[15] GAO Report 25. A 1993-1994 national study reported a similar average tuition for Catholic elementary schools ($1,572), but higher tuition for other religious schools ($2,213), and nonreligious schools ($3,773). U. S. Dept. of Ed., Office of Educational Research and Improvement, National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993-94 (NCES 1997-459 June 1997) (Table 1.5). The figures are explained in part by the lower teaching expenses of the religious schools and general support by the parishes that run them. Catholic schools, for example, received 24.1% of their revenue from parish subsidies in the 2000-2001 school year. National Catholic Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001). Catholic schools also often rely on priests or members of religious communities to serve as principals, 32% of 550 reporting schools in one study, *id.,* at 21; at the elementary school level, the average salary of religious sisters serving as principals in 2000-2001 was $28,876, as compared to lay principals, who received on average $45,154, and public school principals who reported an average salary of $72,587. *Ibid.*

Justice O'Connor argues that nonreligious private schools can compete with Catholic and other religious schools below the $2,500 tuition cap. See *ante,* at 670-671. The record does not support this assertion, as only three secular private schools in Cleveland enroll more than eight voucher students. See n. 14, *supra.* Nor is it true, as she suggests, that our national statistics are spurious because secular schools cater to a different market from Catholic or other religious schools: while there is a spectrum of

nonreligious private schools, there is likely a commensurate range of low-end and high-end religious schools. My point is that at each level, the religious schools have a comparative cost advantage due to church subsidies, donations of the faithful, and the like. The majority says that nonreligious private schools in Cleveland derive similar benefits from "third-party contributions," *ante,* at 656, n. 4, but the one affidavit in the record that backs up this assertion with data concerns a private school for "emotionally disabled and developmentally delayed children" that received 11% of its budget from the United Way organization, App. 194a—195a, a large proportion to be sure, but not even half of the 24.1% of budget that Catholic schools on average receive in parish subsidies alone, see *supra* this note.

[16] The majority notes that I argue both that the Ohio program is unconstitutional because the voucher amount is too low to create real private choice and that any greater expenditure would be unconstitutional as well. *Ante,* at 656-657, n. 4. The majority is dead right about this, and there is no inconsistency here: any voucher program that satisfied the majority's requirement of "true private choice" would be even more egregiously unconstitutional than the current scheme due to the substantial amount of aid to religious teaching that would be required.

[17] As the Court points out, *ante,* at 645-646, n. 1, an out-of-district public school that participates will receive a $2,250 voucher for each Cleveland student on top of its normal state funding. The basic state funding, though, is a drop in the bucket as compared to the cost of educating that student, as much of the cost (at least in relatively affluent areas with presumptively better academic standards) is paid by local income and property taxes. See Brief for Ohio School Boards Association et al. as *Amici Curiae* 19-21. The only adjacent district in which the voucher amount is close enough to cover the local contribution is East Cleveland City (local contribution, $2,019, see Ohio Dept. of Ed., 2002 Community School Report Card, East Cleveland City School District, p. 2), but its public-school system hardly provides an attractive alternative for Cleveland parents, as it too has been classified by Ohio as an "academic emergency" district. See *ibid.*

[18] The majority relies on *Mueller, Agostini,* and *Mitchell* to dispute the relevance of the large number of students that use vouchers to attend religious schools, *ante,* at 658, but the reliance is inapt because each of those cases involved insubstantial benefits to the religious schools, regardless of the number of students that benefited. See, *e. g., Mueller,* 463 U. S., at 391 ($112 in tax benefit to the highest bracket taxpayer, see Brief for Respondents Becker et al. in *Mueller* v. *Allen,* O. T. 1982, No. 82-195, p. 5);*Agostini,* 521 U. S.,at 210 (aid"must `supplement, and in no case supplant' "); *Mitchell,* 530 U. S., at 866 (O'Connor, J., concurring in judgment) *("de minimis").* See also *supra,* at 694-695.

[19] No less irrelevant, and lacking even arguable support in our cases, is Justice O'Connor's argument that the $8.2 million in tax-raised funds distributed under the Ohio program to religious schools is permissible under the Establishment Clause because it "pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions," *ante,* at 665. Our cases have consistently held that state benefits at some level can go to religious institutions when the recipients are not pervasively sectarian, see, *e. g., Tilton* v. *Richardson,* 403 U. S. 672 (1971) (aid to church-related colleges and universities); *Bradfield* v. *Roberts,* 175 U. S. 291 (1899) (religious hospitals); when the benefit comes in the form of tax exemption or deduction, see, *e. g., Walz* v. *Tax Comm'n of City of New York,* 397 U. S. 664 (1970) (property-tax exemptions); *Mueller* v. *Allen,* 463 U. S. 388 (1983) (tax deductions for educational expenses); or when the aid can plausibly be said to go to individual university students, see, *e. g., Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986) (state scholarship programs for higher education, and by extension federal programs such as the G. I. Bill). The fact that those cases often allow for large amounts of aid says nothing about direct aid to pervasively sectarian schools for religious teaching. This "greater justifies the lesser" argument not only ignores the aforementioned cases, it would completely swallow up our aid-to-school cases from *Everson* onward: if $8.2 million in vouchers is acceptable, for example, why is there any requirement against greater than *de minimis* diversion to religious uses? See *Mitchell, supra,* at 866 (O'Connor, J., concurring in judgment).

[20] The amount of federal aid that may go to religious education after today's decision is startling: according to one estimate, the cost of a national voucher program would be $73 billion, 25% more than

the current national public-education budget. People for the American Way Foundation, Community Voice or Captive of the Right? 10 (Dec. 2001).

[21] Most, if not all, participating students come from families with incomes below 200% of the poverty line (at least 60% are below the poverty line, App. in Nos. 00-3055, etc. (CA6), p. 1679), and are therefore eligible for vouchers covering 90% of tuition, Ohio Rev. Code Ann. § 3313.978(A) (West Supp. 2002); they may make up the 10% shortfall by "in-kind contributions or services," which the recipient school "shall permit," § 3313.976(A)(8). Any higher income students in the program receive vouchers paying 75% of tuition costs. § 3313.978(A).

[22] As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause. See Feldman, Intellectual Origins of the Establishment Clause, 77 N. Y. U. L. Rev. 346, 398 (May 2002) ("In the time between the proposal of the Constitution and of the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience").

[23] And the courts will, of course, be drawn into disputes about whether a religious school's employment practices violated the Ohio statute. In part precisely to avoid this sort of involvement, some Courts of Appeals have held that religious groups enjoy a First Amendment exemption for clergy from state and federal laws prohibiting discrimination on the basis of race or ethnic origin. See, *e. g.,* *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F. 2d 1164, 1170 (CA4 1985) ("The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level"); *EEOC v. Catholic Univ. of America*, 83 F. 3d 455, 470 (CADC 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F. 3d 184, 187 (CA7 1994). This approach would seem to be blocked in Ohio by the same antidiscrimination provision, which also covers "race . . . or ethnic background." Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp. 2002).

[24] See, *e. g.,* Christian New Testament (2 Corinthians 6:14) (King James Version) ("Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?"); The Book of Mormon (2 Nephi 9:24) ("And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it"); Pentateuch (Deut. 29:19) (The New Jewish Publication Society Translation) (for one who converts to another faith, "[t]he Lord will never forgive him; rather will the Lord's anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the Lord blots out his name from under heaven"); The Koran 334 (The Cow Ch. 2:1) (N. Dawood transl. 4th rev. ed. 1974) ("As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them").

[25] See R. Martino, Abolition of the Death Penalty (Nov. 2, 1999) ("The position of the Holy See, therefore, is that authorities, even for the most serious crimes, should limit themselves to non-lethal means of punishment") (citing John Paul II, *Evangelium Vitae,* n. 56).

[26] H. Donin, To Be a Jew 15 (1972).

[27] See R. Martin, Islamic Studies 224 (2d ed. 1996) (interpreting the Koran to mean that "[m]en are responsible to earn a living and provide for their families; women bear children and run the household").

[28] See The Baptist Faith and Message, Art. XVIII, available at www. sbc.net/bfm/bfm2000.asp#xviii (available in Clerk of Court's case file) ("A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ").

Matthews v. Quinton
362 P.2d 932
Alaska 1961
April 03, 1961

Term

362 P.2d 932

Supreme Court of Alaska.
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.
April 3, 1961.
Rehearing Denied June 29, 1961.

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

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

Before NESBETT, 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.[FN1]

FN1. 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 purpose 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.

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 Immaculate Conception Elementary School, a nonpublic 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.[FN2] 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.[FN3] 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.

FN2. Section 37-7-1, ACLA 1949.

FN3. Section 37-2-8, ACLA 1949, as amended, SLA 1957, Ch. 51 (§ 37-2-8, ACLA Cum.Supp.1957).

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 28, 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 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.[FN4] 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.[FN5] Section 9 of this Act prohibited the appropriation of public funds for nonpublic school purposes in the following language:

FN4. Chapter 39, SLA 1955: '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 37-2-8 ACLA 1949 for children attending public schools, transportation 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.'

FN5. 37 Stat. 512, 48 U.S.C.A. § 21 et seq.

'* * * nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any secarian, denominational or private school, or any school not under the exclusive control of the government; * * * and 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.'[FN6]

FN6. 37 Stat. 514, 48 U.S.C.A. § 77.

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.

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' having been met.[FN7] 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.

FN7. See note 4 supra.

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.[FN8] The reasoning employed in support of this position is perhaps best stated in the New York case of Judd v. Board of Education[FN9] wherein the court said:

FN8. 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 198; McVey v. Hawkins, 1953, 364 Mo. 44, 258 S.W.2d 927.

FN9. 1938, 278 N.Y. 200, 15 N.E.2d 576, 582, 118 A.L.R. 789.

'* * * 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 institution 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.[FN10] 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,[FN11] as follows:

FN10. 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, 26 A.2d 377; Bowker v. Baker, 1946, 73 Cal.App.2d 653, 167 P.2d 256.

FN11. 1946, 73 Cal.App.2d 653, 167 P.2d 256, 260.

'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 coinferred 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 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.'[FN12]

FN12. 161 A.2d at page 775 note 2.

In Sherrard v. Jefferson County Board of Education,[FN13] 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.

FN13. 1942, 294 Ky. 469, 171 S.W.2d 963.

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.,[FN14] on the rule of presumption sustained the coinstitutionality 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.[FN15] Be that as it may, New Jersey amended its constitution two years later to permit such transportation. [FN16]

FN14. 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 transportation. The latter case is reported as Everson v. Board of Education of Ewing Tp., 1944, 132 N.J.L. 98, 39 A.2d 75.

FN15. 44 A.2d at pages 340-341.

FN16. See note 45 infra.

The Everson case eventually reached the Supreme Court of the United States, [FN17] which by an unpersuasive five to four decision 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.'[FN18] 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.[FN19] 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.' [FN20]

FN17. Everson v. Board of Education, 1947, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392.

FN18. Id., 330 U.S. at page 4, 67 S.Ct. at page 505, 91 L.Ed. at page 717, 168 A.L.R. at page 1398.

FN19. 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 198, 202.

FN20. The same holds true under the provisions of article VII, section 1, and article IX, section 6 of the Alaska state constitution.

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.[FN21]

FN21. 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.

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.[FN22] If those standards are met, the parent or guardian has a constitutional right to send the child to a nonpublic school.[FN23] 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 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.

FN22. 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.

FN23. Pierce v. Society of Sisters, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468.

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,[FN24] and was ratified and confirmed by article XV, section 1 of the constitution which provides:

FN24. The present action was not commenced until January 30, 1959, twenty-seven days after the effective date of the state constitution.

'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.'[FN25]

FN25. 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 January 3, 1959, in particular Article VII, Section 1 thereof.'

We cannot accept the argument as a sound one. The dictionary[FN26] 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.[FN27]

FN26. Webster, New International Dictionary, Unabridged (2d ed. 1960).

FN27. 1 Willoughby, Constitutional Law of the United States § 7, at 11 (2d ed. 1929).

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.'[FN28]

FN28. 60 P. at page 137.

We recognize the legal principle that a constitutional provision, which from the language used shows expressly or by 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 diverst vested rights.[FN29] 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.[FN30] 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.

FN29. Annotation, 1947, 171 A.L.R. 1072-1079, in which the rule is stated and many cases in relation thereto are cited and discussed.

FN30. People ex rel. McClelland v. Roberts, 1896, 148 N.Y. 360, 42 N.E. 1082, 31 L.R.A. 399; Fontenot v. Young, 1911, 128 La. 20, 54 So. 408; Peck v. Tugwell, 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, 448; Northern Wasco County People's Utility District v. Wasco County, 1956, 210 Or. 1, 305 P.2d 766, 771; Porto Rico Brokerage Co. v. United States, 1934, 71 F.2d 469, 23 CCPA 236.

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 other 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 Alsaska 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 conditioins 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 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.

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,[FN31] we 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,[FN32] and it was also the view favored by the dissenting jurists in Maryland,[FN33] Louisiana (in a textbook case),[FN34] and New Jersey,[FN35] 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.[FN36] Said Mr. Justice Rutledge in the Everson case:

FN31. 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, 168 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.'

FN32. The cases in which the states listed in the text rejected the child benefit theory are cited in note 8 supra.

FN33. Board of Education of Baltimore County v. Wheat, 1938, 174 Md. 314, 199 A. 628, 633-642.

FN34. Borden v. Louisiana State Board of Education, 1938, 168 La. 1005, 123 So. 655, 662-664, 67 A.L.R. 1183.

FN35. Everson v. Board of Education of Ewing Tp., 1945, 133 N.J.L. 350, 44 A.2d 333, 338-343.

FN36. Everson v. Board of Education, 1947, 330 U.S. 1, 47-49, 67 S.Ct. 504, 527, 91 L.Ed. 711, 740.

'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 suffices for 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 maintained 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. * * *'[FN37]

FN37. 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 weaknesses 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 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 parchial as well as in public schools.'

About two years after the United States Supreme Court had handed down its opinion in the Everson case,[FN38] the supreme court of the state of Washington decided in Visser v. Nooksack Valley School District No. 506, [FN39] 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:

FN38. Page 936, supra.

FN39. 1949, 33 Wash.2d 699, 207 P.2d 198, 204.

'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 decicisions of the United States supreme court are entitled to the highest consideration as they bear on related questions before this court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the Everson majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not in support of such schools. While the degree of support necessary to constitute an establishment of religion under the First Amendment to the Federal constitution is foreclosed from consideration by reason of the decision in the Everson case, 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 appellees' contention that the Everson case is controlling in the case 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,[FN40] 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.

FN40. 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.

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 convention[FN41] 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.[FN42]

FN41. 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.

FN42. 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 words 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.

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 vote on it, I think they ought to understand the word 'indirect' cuts out everything, just eliminates all kinds of support.'[FN43]

FN43. Id. at 69.

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.'[FN44] 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 non-public schools at state expense. [FN45]

FN44. 1 Willoughby, Constitutional Law of the United States § 32 (2d ed. 1929).

FN45. 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 Mis.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.'

Earlier in this opinion we stated that we did not consider Chapter 39 a valid exercise of the policy power of the state.[FN46] That point needs to be clarified. It has been said that the policy power-broad and comprehensive though it is-may not be exercised in contravention of plain and unambiguous constitutional inhibitions.[FN47] In Board of Education of Baltimore County v. Wheat,[FN48] 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.

FN46. Pages 937 and 938, supra.

FN47. Mitchell v. Consolidated School Dist. No. 201, 1943, 17 Wash.2d 61, 135 P.2d 79, 146 A.L.R. 612, citing authorities.

FN48. 1938, 174 Md. 314, 199 A. 628, 633.

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

NESBETT, 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 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.[FN1] The state constitution prohibits the payment of money from public funds for the 'direct benefit' of any such school. [FN2] 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.[FN3]

FN1. 37 Stat. 514 (1912), 48 U.S.C.A. § 77 (1952).

FN2. Alaska Const. art. VII, § 1.

FN3. Alaska became a state on January 3, 1959. Exec.Proclamation No. 3269, 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.

It is an established doctrine of American jurisprudence that a legislative enactment is presumed to be valid and constitutional,[FN4] and that the final authority in determining whether this is so is vested in the judiciary. [FN5] 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.[FN6]

FN4. 1 Willoughby, Constitutional Law, § 26 at 42-43, and § 27 at 47 (2d ed. 1929).

FN5. Marbury v. Madison, 1803, 1 Cranch 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, 810; 16 C.J.S. Constitutional Law § 92.

FN6. See Wall v. Close, 1942, 201 La. 986, 10 So.2d 779, 783.

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, 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 state [FN7] -that branch of the state government which derives all of its authority from the constitution.

FN7. 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.

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.'[FN8] 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.

FN8. Webster, New International Dictionary, Unabridged, at 986 (2d ed. 1960).

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.[FN9] It 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.[FN10]

FN9. 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.

FN10. Ex parte Bustillos, 1920, 26 N.M. 449, 194 P. 886, 889.

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.'[FN11] The courts, too, have seen the problem. The Court of Appeals for the Third Circuit, in speaking of a taxing statute, said:

FN11. 1 Willoughby, Constitutional Law, § 8 at 11 (2d ed. 1929).

'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.' FN12

FN12. 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.

The Court of Appeals for the District of Columbia, after referring to the belief that if an act is declared unconstitutional it never had any force or effect, said:

'* * * Yet a realistic approach is eroding this doctrine. * * *' FN13

FN13. Warring v. Colpoys, 1941, 74 App.D.C. 303, 122 F.2d 642, 646, 136 A.L.R. 1025.

The principle, and the problem, has perhaps been most explicitly stated by Mr. Chief Justice Hughes when, in speaking for a nuanimous 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. * * *' FN14

FN14. Chicot County Drainage District v. Baxter State Bank, 1940, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329, 332-333. See also National Labor Relations Board v. Rockaway News Supply Co., Inc., 1953, 345 U.S. 71, 77, 73 S.Ct. 519, 97 L.Ed. 832, 837.

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 serious 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.FN15 If Chapter 39 was void on the day of its enactment, as the majority says it was, then to be consistent 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.

FN15. Everson v. Board of Education, 1947, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711.

In 1955 Alaska was a Territory. Its judiciary consisted of one district court, created by act of Congress.[FN16] Tht 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.[FN17]

FN16. 31 Stat. 322 (1900), 48 U.S.C.A. § 101.

FN17. Lindeberg v. Howard, 9 Cir., 1906, 146 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. 562, 565. See also Missouri, K. & T. Ry. Co. v. Walker, 1911, 27 Okl. 849, 113 P. 907, 908.

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 nonexistent 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 roganic 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 froce', 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 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.[FN18] 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.[FN19] As the United States Supreme Court said with respect to the Federal Constitution:

FN18. 1 Willoughby, Constitutional Law, § 31, at 52 (2d ed. 1929).

FN19. 1 Willoughby, Constitutional Law, supra, at 52, and § 32 at 54. See also 2 Sutherland, Statutory Construction, § 5001, at 481 (3d ed. 1943).

'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. * * *'[FN20]

FN20. Knowlton v. Moore, 1900, 178 U.S. 41, 95, 20 S.Ct. 747, 768, 44 L.Ed. 969, 991. See also Shelley v. Kraemer, 1948, 334 U.S. 1, 23, 68 S.Ct. 836, 92 L.Ed. 1161, 1186.

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 support, 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.'[FN21] (Emphasis added.)

FN21. Alaska Constitutional Convention, Proposal No. 6, Education, November 17, 1955.

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.'[FN22] 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:

FN22. Alaska Constitutional Convention, Report of Committee on Preamble and Bill of Rights on Committee Proposal No. 7, December 15, 1955.

'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 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 permently.[FN23] 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.

FN23. Alaska Constitutional Convention Minutes, Jan. 9, 1956, p. 60.

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.[FN24] 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 mereits 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.

FN24. Id. at 53.

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.'[FN25]

FN25. Id. at 57.

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 * * *.'[FN26]

FN26. Id. at 62-63.

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.'[FN27]

FN27. Id. at 67.

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.[FN28] 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.

FN28. 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.[FN29]

FN29. Id. at 70-71.

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.'[FN30] A member of the committee, Delegate Armstrong, answered this as follows:

FN30. 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.

'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.*'[FN31] (Emphasis added.)

FN31. Alaska Constitutional Convention Minutes, Jan. 9, 1956, p. 76.

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 indirect 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.[FN32] 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.

FN32. § 37-7-1, ACLA 1949.

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. 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 organization.' * * * 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 and other facilities are such an aid. * * *'[FN33]

FN33. 1938, 278 N.Y. 200, 15 N.E.2d 596, 582, 118 A.L.R. 789.

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 purpose, 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 assistanced 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 avantage 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.'[FN34] 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.

FN34. Judd v. Board of Education, supra note 33, 15 N.E.2d at page 582.

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 education, 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 Appeals[FN35] and in the United States Supreme Court.[FN36] 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.

FN35. Everson v. Board of Education, 1945, 133 N.J.L. 350, 44 A.2d 333, 338-343.

FN36. Everson v. Board of Education, 1947, 330 U.S. 1, 47-49, 67 S.Ct. 504, 91 L.Ed. 711, 740.

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.' [FN37]

FN37. Judd v. Board of Education, 1938, 278 N.Y. 200, 15 N.E.2d 576, 582, 118 A.L.R. 789, reargument denied 1938, 278 N.Y. 712, 17 N.E.2d 134.

Similarly, in Oklahoma there was a constitutional prohibition against the use of 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.[FN38] 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.[FN39] 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.

FN38. Gurney v. Ferguson, 1941, 190 Okl. 254, 122 P.2d 1002, 1004.

FN39. Id., 122 P.2d at page 1004.

Decisions of the courts of Delaware, Kentucky and Washington[FN40] 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.

FN40. 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 699, 207 P.2d 198.

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.[FN41] The court concludes from this that Chapter 39 does not effectuate the announced legislative intent.

FN41. 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.

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.

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.'[FN42] 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.[FN43]

FN42. SLA 1933, ch. 114, § 1 (§ 37-2-8, ACLA 1949).

FN43. 4 Alaska Adm.Code § 100(a), at 37.

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.'[FN44] 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.[FN45]

FN44. SLA 1955, ch. 39, § 1.

FN45. 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.

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. 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 undertaking[FN46], 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.'[FN47] 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. [FN48]

FN46. See note 49, infra.

FN47. Metropolis Theater Co. v. City of Chicago, 1913, 228 U.S. 61, 69, 33 S.Ct. 441, 443, 57 L.Ed. 730, 734.

FN48. Day-Brite Lighting Co. v. State of Missouri, 1952, 342 U.S. 421, 423, 72 S.Ct. 405, 96 L.Ed. 469, 472; Berman v. Parker, 1954, 348 U.S. 26, 32, 75 S.Ct. 98, 99 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. 788, 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, 84 L.Ed. 1263, 1272.

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.[FN49] 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.

FN49. 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 unheld, 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 289), 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).

This was evident from proceedings of the Constitutional Convention. Delegate Proposal No. 6, mentioned earlier in this opinion, 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 twelvepoint program we developed in Anchorage last October.'[FN50] 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 official representatives of public education in Alaska.

FN50. Alaska Constitutional Convention Minutes, Jan. 9, 1956, p. 58.

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',[FN51] 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.'[FN52]

FN51. Id. at 59.

FN52. Id. at 64.

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 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.'[FN53]

FN53. Pierce v. Society of Sisters, 1925, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 1078.

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; * * *.'[FN54]

FN54. Alaska Const. art. I, § 1.

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.

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