

DISTRIBUTIVE JUSTICE AND AID TO EDUCATION

When it was learned that the Reverend Thomas Owen Martin would be unable to attend the Baltimore meeting and to present personally the paper he had prepared for the seminar on Distributive Justice and Aid to Education, the Reverend William E. McManus, Assistant Director of the NCWC Education Department, was asked to undertake the direction of this sectional meeting. As the basis of discussion Father McManus offered the following memorandum juxtaposing the extremes of the Church-State question familiar to Americans and suggesting five correlated discussion topics:

I. Introduction:

1. *Encyclical Teaching.* In the Encyclical on the "Christian Education of Youth," Pope Pius XI made these significant statements:

"And let no one say that in a nation where there are different religious beliefs it is impossible to provide for public instruction otherwise than by neutral or mixed schools. In such a case it becomes the duty of the State, indeed it is the easier and more reasonable method of procedure, to leave free scope to the initiative of the Church and the family, while giving them such assistance as justice demands.

"That this can be done to the full satisfaction of families, and to the advantage of education and of public peace and tranquillity, is clear from the actual experience of some countries comprising different religious denominations. There the school legislation respects the rights of the family and Catholics are free to follow their own system of teaching in schools that are entirely Catholic. Nor is distributive justice lost sight of, as is evidenced by the financial aid granted by the State to the several schools demanded by the families."

". . . If such education is not aided from public funds, as distributive justice requires, certainly it may not be opposed by any civil authority ready to recognize the rights of the family and the irreducible claims of legitimate liberty."

“. . . Where this fundamental liberty is thwarted or interfered with, Catholics will never feel, whatever may have been the sacrifices already made, that they have done enough for the support and defense of their schools and for the securing of laws that will do them justice.”

2. *The First Amendment's Meaning* (Everson Decision)

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”

II. Questions:

1. Do parochial schools have a right in justice to the *same amount* of tax support as is given to public schools?
 - (a) Is the constitution as authoritatively interpreted by the Supreme Court “normative” for distributive justice?
 - (b) What exactly is the basis of a private school’s claim for *public* funds?
 - (c) Is a member of Congress who votes against tax aid for parochial school buildings guilty of injustice?

2. Does the individual parent have a *right in justice* to tax support (direct or indirect) for the education of his child in a manner corresponding to his conscientious convictions?
 - (a) Is government’s refusal to support parochial schools an infringement of the parental right?
 - (b) Is this refusal an infringement of religious freedom?

3. Would tax support of private (non-profit) and parochial schools err against the dictates of political wisdom and prudence?
 - (a) Would tax support lead to public (governmental) control of private schools?
 - (b) Would such support create administrative chaos and force a general lowering of academic standards?
 - (c) Does the United States need, for its political welfare, a common public school system in which most children are enrolled?

4. Are Catholics bound in conscience to promote legislation
 - (a) to amend the Constitution so full tax support may be given to Catholic schools?
 - (b) to give auxiliary school services to non-public school pupils?

5. How valid are the following polemical arguments:
 - (a) "Catholics pay double taxes for education."
 - (b) Giving taxes to public schools alone creates a "state monopoly of education."
 - (c) Denying tax-supported bus rides to parochial school pupils is "discrimination."
 - (d) A parochial school child has a right in justice to ride on public school buses.

WILLIAM E. McMANUS, Assistant Director,
NCWC Education Department.

DIGEST OF DISCUSSION:

Father McManus opened the discussion by remarking that the question of state educational aid to private and parochial schools called for the combined talents of the theologian, moralist, and political scientist. He emphasized that discussions of the question by trained theologians were necessary to provide a theological background—e.g., a definition of the rights of the Church, State, parent, and child; determination of the requirements of distributive and social justice in a democratic society—for what has been attempted along administrative lines. While the ensuing discussion did not advance beyond subquestions *a* and *b* of the first discussion topic the

entire outline has been reproduced to indicate areas where precision is required and where future discussion may prove fruitful.

In the light of the clear teaching of Pope Pius XI the members of the section were understandably in agreement that the decision of the Supreme Court might be regarded as "immoral" since it interprets the positive enactment of the Constitution in a manner contrary to natural law. Yet it was suggested, and apparently agreed, that since positive law is an indispensable determinant of the measure of distributive justice we might regard the Constitution thus interpreted as both normative, in the sense of legally binding, and non-normative, in the sense that it does not fulfill the requirements of distributive justice.

The declaration of Pope Pius XI, ". . . If such education is not aided from public funds, as distributive justice requires . . ." prompted the question whether any other species of justice was involved. Mention was made of the primordial sources of this right to educational aid in the right of parents to direct the education of their offspring in keeping with the dictates of their conscience and the right of the child to an education in keeping with his destiny. Yet it did not seem to be the mind of the participants in the discussion that the right to aid for parochial schools could be urged in the name of commutative justice. There was an evident sympathy for the opinion that there was an additional basis in social justice for aid to private education.

Father McManus proposed a restatement of the question with emphasis on the duty of the state rather than the rights of the parents and their parochial schools. The problem then would originate not with the claimants demanding public support for their privately directed schools but rather with the state concerned with a just distribution of the general funds collected for educational purposes. It was felt that there was merit in this shift of emphasis but it was also evident that the members of the seminar would not accept this statement of the question in any sense that would deny or diminish the true *right* of parents to assistance in providing a parochial education for their children.

It was generally agreed that there is both place and need for a modern development of the concept of distributive justice. The classic

treatises do not reflect the ever-broadening functions of the twentieth century state and the increasing demands of legal justice upon the citizen and distributive justice upon the state.

Distributive Justice and Aid to Education *

Since you are already familiar with the statements of the authors of Moral Theology on the virtue of Distributive Justice and the applications they make of that teaching, and with the provisions regarding schools in the various Concordats entered by the Holy See with the nations of the world, so that repetition would be boring, and since the time for presentation is limited, let us come at once to a brief consideration of some conditions which exist in this country with regard to state aid to education.

Within the last month interest in this problem has been further stirred by the publication in the *University of Chicago Law Review* of a symposium on civil liberties to which Prof. Wilber G. Katz contributed an article entitled "Freedom of Religion and State Neutrality."¹ Toward the end of that article he writes:

No case in the Supreme Court has directly involved the question of the validity, under the First Amendment, of tax support for parochial schools. In the New Jersey bus fare case, however, both the majority and the minority clearly assumed that such support is unconstitutional. Until recently, it seemed to me that this assumption was a sound application of the "no aid" rule. It seemed to me that direct payment for educational costs was something more than action to avoid discrimination against religion. Two years ago, I suggested that to protect the freedom of parents in their choice of schools, a tax deduction of some kind for tuition paid to such schools would be permissible.² It seemed to me, however, that affirmative aid to religion would be avoided only if religious schools were limited to the support of individuals paying tuition and voluntary contributions.

This position no longer appears to me to be tenable. The "no aid to religion" rule is a rule prescribing neutrality, forbidding action which aids those who profess religion as compared with

* Read by title in the absence of Rev. Thomas O. Martin.

¹ See 20 U. Chi. L. R. 426.

² See W. G. Katz, "Canon Stokes on Church and State," *The Living Church* 14 (Sept. 16, 1951).

those who do not. If one assumes that the religious schools meet the state's standards for education in secular subjects, it is not aid to religion to apply tax funds toward the cost of such education in public and private schools without discrimination.³ Like the dissenters in the bus fare case, I am not now able to distinguish between the minor payments there involved and payments for educational costs. I believe, therefore, that none of such non-discriminatory uses of tax funds are forbidden by the First Amendment.

The First Amendment, the first section of the Bill of Rights added to the United States Constitution to protect the liberties of the citizens, in the section under discussion here, reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." ⁴ Most of the attacks on "aid" to "parochial" or "sectarian" schools have been based on the theory that such "aid" tended toward an establishment of religion. Not much has been said about the other clause and whether decisions against "aid" amounted to a prohibition of the free exercise of religion. That is what disturbs those who are interested, like Professor Katz, in civil liberties.

As an illustration of some of the attempts which, nevertheless, have been made to avoid anything "prohibiting the free exercise" of religion, Professor Katz cites the case of *Quick Bear v. Leupp*.⁵ In that case the Commissioner of Indian Affairs had agreed with the Bureau of Catholic Indian Missions to pay for education in the mission schools for children whose parents chose such schools. Payment was to be from tribal "trust funds" or "treaty funds." Congress had previously declared "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." The plaintiff relied on this to attack the payments to the Bureau of Catholic Indian Missions. The United States Supreme Court, however, approved such government administration of the trust funds in the interest of freedom of religion. It pointed out that the plaintiff's contention attributed to Congress an intention to

³ See *Cochran v. Board of Education*, 281 U. S. 370. This is the Louisiana text-book case.

⁴ See U. S. Constitution, Amendment I.

⁵ See U. S. 50.

prohibit the free exercise of religion among the Indians. Since this latter intention would have been contrary to the First Amendment it was not allowed and payments to the mission schools were allowed.

Similarly, in a case involving a similar provision for free exercise of religion in the Illinois Bill of Rights the court, in *Dunn v. Chicago Industrial School*⁶ said:

It would be contrary to the letter and spirit of the Constitution to exclude from religious exercises the members of any denomination when the State assumes their control or to prevent the children of members from receiving the religious instruction which they would have received at home.

Involved in the case was the Illinois statute⁷ which provided that neglected and delinquent children should be committed to an institution controlled by persons of the same religious faith as the parents. Payment by the State to such institutions for such care was attacked as being "aid to religion," but was upheld in the interests of religious freedom, so that the State by its action in placing the children in the institution would not be guilty of interfering with their free exercise of religion. For similar reasons chaplains are maintained at government expense in penal institutions and in the armed services where citizens are held by the government with the result that if such chaplains were not provided these citizens would be hindered in their free exercise of religion.

Of course it is easier to see government interference with such free exercise of the right to practice religion in the foregoing cases than it is when it is dealing with citizens who have freedom to move about and choose where they will go. Furthermore, the approach in the cases cited has been negative, telling Congress or the State legislature what they may not do, rather than positive, telling them what they must do in the interests of religious liberty.

The guarantee of religious liberty under the First Amendment to the U. S. Constitution is sometimes said to have been extended by the Fourteenth Amendment to cover the actions of the States. How far, however, that guarantee is extended is a matter of question.

⁶ See Ill. 613, 618, 117 N.E. 735, 737.

⁷ See Ill. Rev. Stat. (1951) c. 23, §§ 211, 299bl.

Thus the Michigan court, after a lengthy examination of the cases has said:⁸

It may well be concluded that the view of the majority as relates to the guaranty of religious freedom is predicated on that same theory. If this conclusion be correct, it may be said that at no time has a majority of the United States Supreme Court subscribed to the theory that the Fourteenth Amendment makes any of the first eight Amendments applicable to the states, although the subject matter of some of them may relate to human rights and liberties so fundamental as to be inherent in due process guaranteed by the Fourteenth Amendment. An examination of the opinions of that court would seem to warrant such statement.

From the foregoing it would appear that the First Amendment limits action by Congress restricting the citizens' free exercise of religion and, insofar as it is applicable to the States through the Fourteenth Amendment, similarly limits them. Provisions similar to those of the First Amendment in State constitutions, of course, limit the actions of State legislatures which would restrict religious freedom.

Also included, however, in many State constitutions adopted or amended since 1850 are prohibitions on the expenditure of moneys raised by general taxation for other than the uses of the public school system. As a result the State courts have been unanimous in declaring laws which tended to aid "sectarian" or "parochial" schools unconstitutional. Such decisions have been rendered in Illinois,⁹ Kentucky,¹⁰ New Hampshire,¹¹ Virginia,¹² and Wisconsin,¹³ to name a few. This is what stands in the way of aid to parochial schools, and it is on the basis of these State constitutional provisions that laws which tend to aid the parochial schools are first attacked. The Federal question of the application of the First Amendment is raised secondarily.

⁸ See *People v. Simon*, 324 Mich. 450, 36 N.W.2d 734, 735.

⁹ See *People v. McAdams*, 82 Ill. 356.

¹⁰ See *Halpert v. Sparks*, 9 Bush. 259; *Underwood v. Wood*, 93 Ky. 177, 19 S.W. 405.

¹¹ See *Holt v. Antrim*, 64 N.H. 284, 9 A. 389.

¹² See *Hall's Free School Trustees v. Horne*, 80 Va. 470.

¹³ See *Curtis's Administrators v. Whipple*, 24 Wis. 350.

Illustrative of the courts' thinking on this matter of aid to "sectarian" schools where there is a constitutional provision against such aid is a case which arose in Massachusetts. There the constitution specifically prohibited appropriations of public moneys for the use of schools maintained exclusively for particular sects. The court held unconstitutional a statute allowing the town of Andover to raise by taxation and appropriate money to aid the trustees of the Pynchard Free School in building a schoolhouse to be used as a public high school, and to aid in defraying the annual expenses of the school. This school had been founded by a charitable bequest which vested control in a board of trustees who were to be limited to members of the Congregational Church, hence the conclusion that it was "sectarian," despite the avowed use as a public high school.¹⁴

Similarly, in Ohio, in a case involving a will which provided for establishment of an "industrial school" for education in arts and sciences, with Bible teachings a prominent feature, and providing that the school should be Protestant in ethics and teachings but otherwise undenominational and should not exclude those of other faith, the court held that an intent to establish a sectarian Protestant school was manifested and hence the village in question could not issue bonds or expend funds raised by taxation for support thereof as required by the will.¹⁵

In New York the court said that a Roman Catholic orphanage could not share in public moneys out of the common school fund voted by the legislature for use of children between the ages of four and sixteen since the definition of a "common school" to which under the State laws the moneys had to be paid did not include an orphanage or a school under the auspices of a church.¹⁶

South Dakota has also held that a parochial school is no part of the "public school system," mentioned in the laws of that State as the sole beneficiary of the school fund.¹⁷ The Connecticut court has

¹⁴ See *Jenkins v. Andover*, 103 Mass. 94.

¹⁵ See *Findley v. City of Conneaut*, 145 Ohio St. 480, 62 N.E.2d 318, 76 Ohio App. 153, 63 N.E.2d 449.

¹⁶ See *People v. Board of Education*, 13 Barb. 400; see also *State v. Hallock*, 16 Nev. 373.

¹⁷ See *Haas v. Independent School Dist. No. 1 of Yankton*, 69 S.D. 303, 9 N.W.2d 707.

explained that in order to constitute a school "public" as distinguished from a "parochial" school, it must remain under the exclusive control of the State through the State's constituted agencies and must be free from sectarian instruction.¹⁸

In line with these decisions is that of the Missouri court which said that the inclusion of a Catholic parochial school in the public school system and the maintenance thereof as a part of and an adjunct to the parish church in its religious teachings was violative of the constitutional provision forbidding school districts from making payments from any public fund to sustain any private or public school controlled by a sectarian denomination. The inclusion, therefore, of a Catholic parochial school in the public school system and retention of sisters of a religious order as teachers, who gave instruction in the faith of their religious belief in addition to the course of secular instruction prescribed for the public schools was violative of the constitutional prohibition against payment of teachers of religion from public school funds. The court went on to say that public money, coming from taxpayers of every denomination, could not be used for the help of any religious sect in education or otherwise.¹⁹

In Indiana, however, a situation arose in which the Catholic Church had contributed buildings and equipment formerly used for a parochial school to the city school board. This situation did not, said the court, make the schools "parochial" in the sense of the constitutional prohibition regarding expenditure of public moneys for the benefit of a religious institution, since the acceptance of a private donation to a public cause did not make the cause private. Each morning religious instruction was given in a nearby church. This, however, said the court, was not the equivalent of "sectarian teachings" and "parochial schools." The pupils, the court found, were the children of Catholic parents, the services were voluntary, and the instructions were not given during school hours.

The court went on to say that whether the school was parochial or public was to be determined by who controlled it, on the issue whether the trustees could pay the salaries of the teachers who belonged to a Roman Catholic religious order, but were regularly

¹⁸ See *City of New Haven v. Town of Torrington*, 132 Conn. 194, 43 A2d 455.

¹⁹ See *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609, 141 A.L.R. 1136.

licensed by the State. The course of study was further found to have been prescribed by the Board of Education and the school was visited and supervised by the city superintendent, so the court concluded that this was a "public school" entitled to support from the public school fund.²⁰

These decisions point up some of the difficulties for both Protestant and Catholic schools which arise under these and other similar constitutional provisions, like that of Alabama which requires that all school funds be faithfully applied to the maintenance of "public" schools.²¹ The Florida court has added that the constitutional mandate, that the state school fund shall remain sacred and inviolate, cannot be overcome by contract.²² The Montana court adds that since the constitution provides that the state public school fund shall consist of the proceeds of all estates or distributive shares of estates that may escheat to the State, the legislature has no power to divert escheated estates or shares to other uses.²³

From the foregoing it would appear that even if Professor Katz' view that the First Amendment to the U. S. Constitution does not forbid direct aid to parochial schools should be sustained there would still be a difficulty arising from the specific provisions in the constitutions of many of the States, unless such provisions could be amended, or overturned on the plea that they constitute an interference with the free exercise of religion, as well as with the parents' right to choose the school their children shall attend,²⁴ by reason of the fact that they make such exercise economically difficult.

It is these provisions against aid which have created the difficulties presented in the "released time" cases.²⁵ The point has also

²⁰ See *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256.

²¹ See *Board of Education of Jefferson County v. State ex rel. Carmichael*, 237 Ala. 434, 187 S. 414, construing Ala. Const. 1901 § 258.

²² See *State Board of Education v. Board of Public Instruction for Lake County*, 138 Fla. 767, 190 S. 253.

²³ See *Bottomly v. Meagher County*, 114 Mont. 220, 133 P2d 770.

²⁴ See *Pierce v. Society of Sisters*, 268 U. S. 510 (Oregon School Case).

²⁵ See *McCullum v. Board of Education*, 333 U. S. 203 (Champaign case); *Gordon v. Board of Education of Los Angeles*, 78 Cal. App. 2d 475, 178 P2d 488; *Zorach v. Clauson*, 198 Misc. 639, 99 N.Y.S.2d 339.

been raised with regard to tax exemption, Bible reading, teachers' retirement, as well as textbooks and transportation.

In the matter of tax exemption the *Furman Schools* case²⁶ noted that the service rendered was for the public benefit and the tax exemption was upheld. This is in line, of course, with the traditional idea of a "charity" described by Lord Eldon in *Morice v. Bishop of Durham*.²⁷ He there said that the term includes "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, . . . or otherwise lessening the burdens of government."

In the *Doremus* case²⁸ the court held that Bible-reading—some five verses of the Old Testament, without comment—and recitation of the Lord's Prayer was not "sectarian" and hence was allowable in public schools. Similarly, the right of teachers to have time spent teaching in parochial schools counted toward their retirement was upheld in the *Gubler* case as not being "aid to religion" and as tending to encourage people to teach.²⁹

A New York attempt to provide free textbooks for pupils in parochial as well as in public schools was, however, struck down on the theory that the phrase in the Education Law "schools of the school district" could only mean the public schools of the district under the control of the board of education. The court refused to accept the "aid to the pupil" argument, saying:

The school is not the building and its equipment; it is the organization, the union of all the elements in the organization, to furnish education in some branch of learning—the arts or sciences or literature. It is the institution and the teachers and scholars together that make it up. The pupils are part of the school. . . . It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils, and not a furnishing in aid or maintenance of a

²⁶ See *Furman Schools v. Town of Litchfield*, 134 Conn. 9, 54 A2d 710.

²⁷ See 9 Ves. 299, 10 Ves. 522.

²⁸ See 5 N.J. 444, 75 A2d 884, 7 N.J.S. 450, 71 A2d 732.

²⁹ *Gubler v. Utah State Teachers' Retirement Board*, 113 Ut. 200, 192 P2d 580.

school of learning. It seems very plain that such a furnishing is at least indirectly in aid of the institution and that if not in actual violation of the words, it is in violation of the true intent and meaning of the constitution and in consequence equally unconstitutional.³⁰

In Louisiana, on the contrary, a statute providing for free textbooks for the children of the State was sanctioned by the court because it found: 1—the law did not provide for the purchase of books for sectarian schools; 2—by providing for free books for the children of the State the law was obviously enacted for the benefit of the children and the “resulting benefit of the State”; 3—the schools were not the beneficiaries of the statute (contrary to New York view); 4—the books furnished by the State were not sectarian books; 5—“none is to be expected, adapted to religious instruction.”³¹ When the case came to the United States Supreme Court the decision of the Louisiana court was upheld, Mr. Justice Holmes saying:

Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.³²

Referring to this case in *Carmichael v. Southern Coal Co.*³³ the same Supreme Court said:

The end being legitimate, the means is for the legislature to choose. When public evils ensue from individual misfortune or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals (citations). Individual interests are aided only as the common interest is safeguarded. See *Cochran v. Board of Education*.

³⁰ See *Smith v. Donahue*, 195 N.Y.S. 715.

³¹ See *Bordon v. Louisiana State Board of Education*, 168 La. 1005, 123 S. 655.

³² See *Cochran v. Louisiana State Board of Education*, 281 U. S. 370.

³³ See 301 U. S. 495.

Though of the other States only Mississippi has decided that textbooks could be supplied to the pupils, it would seem that the reasoning of Mr. Justice Holmes is more solidly based upon a broad public-spirited outlook than is that of the New York court. If the States are really as interested in fostering education as they claim to be it is hard to understand why they persist in striking at the common interest by striking at the individual interest.

The Mississippi court, in the *Chance* case,³⁴ upheld a statute making an appropriation for the State textbook fund to pay the expenses of the State Textbook Rating and Purchasing Board to purchase free textbooks for distribution to pupils in all qualified elementary schools in the State, including private and sectarian schools. The court said that the statute did not create a use or diversion of "school or other educational funds" by the State in violation of the constitution. The court also observed that the books were merely lent by the State, with provision for compensation thereto for loss or damage.

Transportation of parochial school pupils seems to cause the greatest amount of discussion at the present time on the theory that it constitutes "aid to religion." In the New Jersey bus fare case³⁵ the United States Supreme Court held that the statute authorizing the school district boards of education to contract for transportation of children to and from schools, including other than public schools, and the resolution of the township board of education for transportation of children to designated schools, including some not connected with the public school system, were not unconstitutional as authorizing such board's use of any of its apportioned share of the income of the state school fund to pay the cost of transporting pupils to parochial schools.

In Maryland the court said that the statute providing that children attending Baltimore county schools not receiving State aid should be entitled to transportation on school buses on the same

³⁴ See *Chance v. Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 S. 706.

³⁵ See *Everson v. Board of Education*, 330 U. S. 1.

terms as public school children, and providing for the raising of the necessary money, was not unconstitutional as violating the requirement that the school fund of the State should be kept inviolate and appropriated only to the purposes of education.³⁶

In that same State the court found that the appropriation in 1939 of \$10,000 for the transportation of private school children in St. Mary's County in their own buses was intended to give the Commissioners broader authority to provide for transportation than they had under the 1935 Act, on which the previous case was based. Similarly the Act of 1941 giving the pupils the right to travel on public school buses along their route was held not to repeal the Act of 1939 regarding the providing of other transportation.³⁷

In New York, however, the *Judd* case³⁸ held that the transportation of pupils for sectarian schools was unconstitutional "since the purpose of transportation is to promote the interest of the private school or the religious or sectarian institution that controls it," and any contribution directly or indirectly made in aid of maintenance and support thereof out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of the constitution.

Where the pupils pay tuition it might be argued that by bringing them to the school the State is aiding the institution at least indirectly. Where, however, the school is operated in such wise that expenses are born by the parish or the religious community, it is harder to see the logic of the New York court's position, unless it feels that by transporting the pupils to the school the State is adding to the prestige of a religious organization. Perhaps the court is saying that the State should do nothing which would aid religion by adding to its prestige. Perhaps, too, it is saying that while the parochial school provides classrooms which otherwise the State would

³⁶ See Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628.

³⁷ See Adams v. County Comm'rs of St. Mary's County, 180 Md. 550, 26 A2d 377.

³⁸ See *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576, 118 A.L.R. 789

have to build the State should not, even indirectly, aid itself by bringing the pupils to these classrooms which are being provided by private funds, as a "charity" under Lord Eldon's definition, but should seek to cram the pupils into its own already overcrowded classrooms.

At any rate, the thinking of the New York court has been accepted in other jurisdictions. The Oklahoma court, in the *Gurney* case,³⁹ has held that a statutory provision for transportation of children attending parochial schools was unconstitutional. In the *Mitchell* case⁴⁰ the Washington court held that a statute commanding the directors of public school districts in which there were buses for transportation to and from public schools to carry children to and from private schools contravened the constitutional requirement that the entire revenue from the common school fund and the state tax for the common schools be applied exclusively to the support of the common schools, since the statute necessitated the use of common school funds for other than "common school purposes." The children in question attended a "Christian School" under the auspices of the Christian Reformed Church.

On the other hand, the Oklahoma court, where public moneys were not involved, held that a railroad whose franchise provided for half-fares for school children, was required to furnish transportation to parochial school children at the reduced rate.⁴¹

It would appear, then, that the situation in this country is that in most States there are provisions in the State constitution which expressly or by implication prohibit any diversion of the funds collected through taxation for the public school system to the support of "sectarian" schools which are not considered part of that system even though their courses of study are prescribed and supervised by the State, their teachers licensed by the same, and their pupils present in obedience to the compulsory attendance laws of the State.

³⁹ See *Gurney v. Ferguson*, 190 Okl. 254, 122 P2d 1002.

⁴⁰ See *Mitchell v. Consolidated School Dist. No. 201*, 17 Wash. 2d 61, 135 P2d 79, 146 A.L.R. 612.

⁴¹ See *Oklahoma R. Co. v. St. Joseph's Parochial School*, 33 Okl. 755, 127 P. 1087.

By the fact that their parents exercise their right to choose freely whether their children shall attend a "public" school or another both pupils and parents are cut off from the benefits of the "common school" fund and are forced to assume a serious economic burden. Whether this constitutes, as Professor Katz suggests, an interference with religious liberty is yet to be decided.

THOMAS O. MARTIN,
Catholic University of America.