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Constitutional Law--Use of State Funds for Transportation of Children to Parochial Schools

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CONSTITUTIONAL LAW—USE OF STATE FUNDS FOR TRANSPORTATION OF CHILDREN TO PAROCHIAL SCHOOLS*

Under a New Jersey statute[1] authorizing its local school districts to make rules and contracts for the transportation of children to and from schools, defendant board of education authorized reimbursement of money expended by parents for transportation of their children on commercial busses. Part of this money was for payment of transportation of some children in the community to and from Catholic parochial schools. These church schools give secular education and regular religious instruction conforming to the religious tenets and modes of worship of the Catholic faith. A taxpayer's suit was filed challenging the right of the Board to reimburse parents of parochial school students. The Supreme Court held that the Board had the right to make such a reimbursement stating: "The state contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[2]

A strong dissenting opinion,[3] concurred in by three justices, was written by Mr. Justice Rutledge attacking the majority's holding as a violation of the First Amendment of the Constitution, made applicable to the states by the Fourteenth Amendment:[4]

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; "[5]

The minority based its view on what seems to be the sounder reasoning. For the purpose of this discussion, it will be well to look at the history of the First Amendment. Incessant wrangling between sects for public support and what was felt to be obnoxious taxation for the support of the church provided the incentive for a strict separation of church and state. Jefferson and Madison were successful in getting a *Bill for Establishing Religious Freedom*[6] through the Virginia Assembly. Madison was later sent

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* This note which takes a view contra to the decision by the Supreme Court is published as a companion note to the one by Mr. Hopkins on P 328 agreeing with the case.

[1] N. J. REV. STAT (Cum. Supp. 1941) 18—14—8.

[2] Everson v. Bd. of Education of Ewing Township,—U. S.—, 91 L. Ed. 472, — 67 Sup. Ct. 504, 513 (1947).

[3] See Mr. Justice Rutledge, dissenting in Everson v. Bd. of Education of Ewing Township, — U. S. — 91 L. Ed. 472, 486, 67 Sup. Ct. 504, 517 (1947).

[4] Murdock v Pennsylvania, 319 U. S. 105, 87 L. Ed. 1292, 63 Sup. Ct. 870 (1943)

[5] U. S. CONST. AMEND. I.

[6] See Mr. Justice Rutledge, dissenting in Everson v. Bd. of Education of Ewing Township, — U. S. —, 91 L. Ed. 472, 486, 67 Sup. Ct. 504, 517 (1947)

to the First Congress to establish a similar freedom for the nation and proposed such a measure, which became the First Amendment. To Madison, religion was wholly a private matter beyond the scope of civil power either to restrain or to support.[7]

The problem of support manifests itself in the form of numerous attempts to obtain public funds in aid of religious institutions. In the category of cases upholding such aid, the extreme case seems to be *State ex rel. Johnson* v. *Boyd.*[8] Public funds were used here to pay teacher's salaries to Catholic Sisters teaching in several schools which were formerly operated as parochial schools. Except for state aid, these schools would have been forced to close. Religious services were discontinued during school hours but the students who formerly attended these schools continued to attend them without regard to the school district in which they lived. In an action to recover salaries paid to the Sisters as teachers, it was held that public supervision of the curriculum and the fact that no religious instruction was given during school hours was sufficient to denominate these schools as "public" schools. However, eight other jurisdictions have denied the validity of attempted use of public funds by sectarian institutions as violating the principle of separation of the church and state.[9]

It would seem that the same problem is presented in several cases involving the furnishing of textbooks by the state to students in parochial schools. Thus, in Louisiana, free textbooks were furnished all school children on the basis that private schools were not the beneficiaries of the appropriation but that the children and the state alone were the beneficiaries.[10] This case was appealed from a decision of the Louisiana Supreme Court upholding such action on the authority of *Borden* v. *Louisiana State Board of Education,*[11] decided the same day, in which three Justices dissented on the ground that the purchasing of books to be used in sectarian schools is to use such money "indirectly" if not "directly" in aid of the church conducting the schools. Similarly, transportation furnished children going to parochial schools in Baltimore County, Maryland, was held to be a public function and a valid exercise of the state's police power

[7] *Ibid.*

[8] 217 Ind. 348, 28 N. E. 2d 256 (1940).

[9] Knowlton v Baumhouer, 182 Iowa 691, 166 N. W 202 (1918) Atchison, T. & S. F Ry. v. City of Atchison, 47 Kan. 712, 28 Pac. 1000 (1892) Williams v. Bd. of Trustees Stanton School District, 173 Ky. 708, 191 S. W 507 (1917) Jenkins v Inhabitants of Andover, 103 Mass. 94 (1869) State ex rel. Public School District No. 6 v. Taylor, 122 Neb. 454, 240 N. W 573 (1932) State ex rel. Nevada Orphan Asylum v Hallock, 16 Nev. 373 (1882), Collins v Kephart, 271 Pa. 428, 117 Atl. 440 (1921) Synod of Dakota v State, 2 S. D. 376, 50 N. W 632 (1891)

[10] Cochran v. Louisiana State Bd. of Education, 281 U. S. 370, 74 L. Ed. 913, 50 Sup. Ct. 335 (1930).

[11] 168 La. 1005, 123 So. 655 (1929).

for the protection of children from traffic hazards.[12] It may be noted that the religious issue was not raised by the *majority* of the court in these cases. However, the dissenting opinions in these cases considered such aid to be a contribution to a sectarian school. It might be worthwhile to note here also that these cases, which have upheld such action, arose in states which have had large Catholic populations throughout their history

The position of the minority of the court in the *Everson* case is supported by numerous decisions. In *Smith* v. *Donahue*,[13] the New York court said, " the parochial schools are furnished by the Roman Catholic Church, in order that, along with secular education, the youth of the Church may receive instructions in its religious beliefs and rules. In accord with its principles in that respect, the state will not interfere, but it may not assist in aid of any distinct religious tenet."[14] As to furnishing books and supplies to the pupils, the court goes on to say, "We think the act plainly comes within the prohibition of the Constitution (State) if not directly in aid of the parochial schools, it certainly is an indirect aid."[15]

Contrary to the Baltimore County transportation case, the majority of decisions involving the furnishing of transportation to pupils attending a sectarian school hold that such action is an appropriation of moneys in aid of the school and for this reason is unconstitutional.[16] State ex rel *Traub* v. *Brown*,[17] held, " we are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations." The court further commented that it was not impressed by the reasoning in the Louisiana textbook cases. In a later case, the New York Court became more emphatic and ruled that furnishing of transportation at public expense to pupils attending parochial schools is unconstitutional as a use of public money in aid of a school or institution of learning in which any denominational tenet or doctrine is taught.[18]

Legal writers have criticized granting such aid under the argument that the pupil is the beneficiary. The basis of their opinions is that the logical result of such argument would justify the use of public funds to pay practically all the expenses of a private or parochial school and thus a result would be achieved indirectly that could not be achieved directly[19] Another writer has foreseen a

[12] Bd. of Education of Baltimore County v Wheat, 174 Md. 314, 199 Atl. 628 (1938).

[13] 202 App. Div. 656, 195 N. Y. Supp. 715 (1922)

[14] *Id.* at — 195 N. Y. Supp. 715, 719 (1922).

[15] *Ibid.*

[16] Note (1941) 141 A. L. R. 1136, 1152.

[17] 6 W W Harr. (36 Del.) 181, 172 Atl. 835 (1934)

[18] Judd v Bd. of Education, 278 N. Y. 200, 15 N. E. 2d 576 (1938)

[19] Note (1938) 37 MICH. L. REV. 335.

reawakening of internal religious strife as a result of departing from a strict separation of church and state, saying: "Entrance of the state upon a program of religious subsidy, however benign, reawakens the slumbering forces of intolerance and hate and invites them to a contest for public support."[20]

It is submitted that the decision of the majority of the Supreme Court in the New Jersey school board case is another step toward returning to the situation existing at the time of the enactment of the First Amendment. When the problem arises again, it would seem to be in the public interest for the Court to retreat to the line of decisions which held that such state aid was in aid of the church which seems to be the only logical interpretation of such action. This appears to be the only possible way to avert the inevitable consequences of increased taxation and public religious wrangling that are sure to result if the door is opened wider.

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[20] Note (1941) 50 YALE L. J. 917, 926.