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STATE TRANSPORTATION OF STUDENTS TO PAROCHIAL SCHOOLS—THE EVERSON CASE*

A New Jersey statute authorized the local school boards to provide for the transportation of children to and from school.¹ Acting pursuant to this statute, the Board of Education of Ewing reimbursed the parents of children attending parochial schools for money expended by them in transportation of their children to such schools. A suit was brought by a taxpayer to recover the money thus paid out by the School Board. *Held*: Such statute does not contravene the prohibition of the First Amendment of the Constitution of the United States against the enactment of a "law respecting the establishment of religion" as made applicable to the states by the Fourteenth Amendment.²

The opinion of the majority was that the statute was a valid exercise of the police power of the state, which did not aid the school to which the students were transported. The Court stated that a New Jersey statute providing for partial unconstitutionality precluded discussion as to whether or not children enrolled in church schools of faiths other than the Catholic were denied equal protection of the laws, if it were to be considered that such point were raised by the appeal.³ The minority view deemed transportation an integral part of modern education and that by extending it to children attending parochial schools the state aided the Catholic religion. It is the contention of the author that the opinion of the majority is the better view and its result the more socially desirable.

To determine the constitutional validity of a statute under the First Amendment, it is necessary to see what restraints are imposed by that Amendment upon state action. The Court enumerated the following restrictions on state action:

" 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 to 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

* For a companion note taking a contra view see P 324, *supra*.

¹ 1 N.J. REV. ST. (1937) 18:14-8.

² *Everson v. Board of Education*, —U.S.— 91 L. Ed. 472, 67 Sup. Ct. 504 (1947).

³ *Murdock v. Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292, 63 Sup. Ct. 870 (1943), *Cantwell v. Connecticut*, 310 U.S. 296, 84 L. Ed. 1213, 60 Sup. Ct. 900 (1940)

⁴ *Everson v. Board of Education*, —U.S.— 91 L. Ed. 472, 473-474, 67 Sup. Ct. 504, 506 (1947).

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.'"⁵

The Amendment, as thus defined, is the loud voice of protest by early Americans against the institution of state-religion, which had been transplanted from the Old World from which they came, to the New in which they settled. It demands, not impiety, but no religion of the government; "it requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."⁶

Thus the question is directly presented: Does a state by the transportation of students to and from a parochial school or the reimbursement to their parents therefor, violate that strict neutrality required of a state in its dealings with religion? The effect of this statute is not to relieve the parochial school of any obligation it owes to the students, for it owes none to provide transportation to and from school. Its purpose and result is to remove children attending school from the hazards of the highways, to provide for their safe transportation without any inquiry as to their religious beliefs. The benefits *conferred* by the statute are upon the child, and those gained by the school, if any are incidentally *derived* from it.

This view is not without precedent, although a majority of the states have proceeded upon the reasoning found in the dissenting opinion.⁷ The courts of Maryland,⁸ Kentucky,⁹ and California¹⁰ had previously approved the practice in question, holding that it was a valid exercise of the police power of the state for the benefit of the child. The language of the Kentucky court is typical. In upholding such a statute, it said:

⁵ *Id.* at —, 91 L. Ed. 472 at 479-480, 67 Sup. Ct. 504 at 511-512.

⁶ *Id.* at —, 91 L. Ed. 472 at 481, 67 Sup. Ct. 504 at 513.

Judd v. Board of Education, 278 N.Y. 200, 15 N.E. 2d 576 (1938) State ex rel Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923).

⁸ Adams v. County Com. of St. Mary's County, 180 Md. 550, 26 A. 2d 377 (1942), Board of Education v. Wheat, 174 Md. 314, 199 Atl. 628 (1938).

⁹ Nichols v Henry, 301 Ky. 434, 191 S.W. 2d 930 (1945) *But cf.* Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W. 2d 963 (1942).

¹⁰ Bowker v Baker, — Cal. — 167 P. 2d 256 (1946).

"It constitutes simply what it purports to be—an exercise of police power for the protection of childhood against the inclemency of the weather and from the hazards of present-day highway traffic. The circumstance, that in Catholic schools the Catholic faith is taught and in Protestant schools the Protestant faith is taught, does not change the purpose or the effect of the Act nor convert it into one which gives preference to a religious sect or society,"¹¹

Also reductions of transportation rates have been successfully demanded of public carriers by municipalities.¹² Cases identical in principle to the transportation cases have arisen under state statutes authorizing the distribution of free textbooks to students in other than public schools. As in the transportation cases, the decisions are not in harmony.¹³ But educational benefits, realized at both public and private institutions, conferred by the state upon veterans of the first World War were upheld by the Wisconsin court as not violating the prohibition against state aid to a religion.¹⁴ In giving educational aid to veterans today, the Federal Government makes no distinction between public and private schools at which the instruction may be received.¹⁵ Likewise, federal aid was given to students attending both public and private schools under the government program as administered by the F. E. R. A. and the N. Y. A. during the recent depression.¹⁶

It is submitted by the writer that the true test in those cases where the benefit conferred is not in itself religious should be to determine upon whom the burden would fall if the aid were not allowed. In the cases of textbooks and transportation it is obvious that the burden would be upon the student. It has never been the custom for the institution to supply its students with their textbooks or with their transportation. Such a test should satisfy those critics, who while not in disagreement as to providing transportation and certain textbooks, fear the results which the rule adopted might be extended to include.¹⁷ Under the test proposed a state could never pay the salaries of teachers in a parochial school as that is a necessary incident of the operation of the school and must be

¹¹ *Nichols v. Henry*, 301 Ky 434, 439, 191 S.W. 2d 930, 932 (1945).

¹² *Okla. Ry v St. Joseph's Parochial School*, 33 Okla. 755, 127 Pac. 1087 (1912), 47 Stat. 752, 759 (1933).

¹³ *Cochran v Louisiana State Board of Education*, 168 La. 1030, 123 So. 664 (1929) *Chance v Miss. State Textbook Rating and Purchasing Board*, 190 Miss. 453; 200 So. 706 (1941). *Contra: Smith v. Donahue*, 195 N.Y. Supp. 715, 202 App. Div. 656 (1922)

¹⁴ *State ex rel Atwood v Johnson*, 170 Wis. 251, 176 N.W. 224 (1920).

¹⁵ 38 U.S.C.A., Ch. 12, p. 150, 11a (1946 P.P.)

¹⁶ GABEL, *PUBLIC FUNDS FOR CHURCH AND STATE SCHOOLS* (1937) 535-536.

¹⁷ Note (1931) 25 ILL. L.R. 547; JOHNSON, *CHURCH-STATE RELATIONSHIPS IN THE UNITED STATES* (1934) 196.

borne by the school authorities. Nor could a state provide school children with the Bibles of their respective faiths for such a benefit is in itself religious.

It is to be noted that the discussion has been confined to the religious issue, which it is felt is the controlling one. In view of the reasoning adopted to sustain the statute when attacked on religious grounds, the position that such an action is an appropriation of public property for private use becomes untenable. It has been pointed out that such statutes are an exercise of the police power of the state, passed to meet a public need. If a state may transport children to public schools, which is now firmly established,¹⁸ without appropriating public property for a private use, it follows that it may do so in the case of parochial schools as long as the aid is considered as being given to the child and not to the school. The Supreme Court, in affirming the state court's decision in the Louisiana textbook case, ruled upon the question of appropriation for private use and held that the state action did not constitute such an appropriation.¹⁹ Even the dissenting justices in the *Everson* case realized that no obstacle was presented by the question. Justice Rutledge in his dissenting opinion stated, "Stripped of its religious phase, the case presents no substantial federal question."²⁰

Thus, in conclusion, it is submitted that if a state confers a benefit, not religious in itself, upon the child rather than upon the school which he attends, it is a statute within the recognized power of the state to legislate for the welfare of its citizens; and that the true test in determining upon whom the benefit is conferred is to determine upon whom the burden would lie if the aid were not allowed.

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¹⁸ *Pasadena City High School Dist. v Uppjohn*, 206 Cal. 775, 276 Pac. 341 (1929), *School Dist. No. Three of Atchison County v Atzenweiler*, 67 Kan. 609, 73 Pac. 927 (1903) *Bufkin v Mitchell*, 106 Miss. 253, 63 So. 458 (1913).

¹⁹ *Cochran v. Louisiana State Board of Education*, 281 U.S. 370; 74 L. Ed. 913, 50 S. Ct. 335 (1930).

²⁰ See Mr. Justice Rutledge, dissenting in *Everson v Board of Education*, — U.S. —, 67 S. Ct. 504, 528, 91 L. Ed. 472, 497 (1947)