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Constitutional Law - State Aid to Parochial Schools

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It is submitted that the view of the dissenters might also have been permissible without transcending the limits of statutory interpretation[20] and that the possibility of dissatisfaction and confusion in the industry such as existed in the insurance field between the time of deciding the *Southeastern Underwriters'* case[21] and the passage of the McCarran Act[22] might thus be avoided.[23] Such a possibility, of course, is very real where a body of comprehensive state regulation dating from *Munn v. Illinois*,[24] decided some seventy years earlier, is stricken down in favor of a toothless federal act, having as its chief sanction the revocation of a federal license obtained on a voluntary basis and which act is administered by an understaffed, overworked Secretary of Agriculture, whose organizational setup is woefully inadequate to cope with the duties imposed on it by the Court's ruling.

ROBERT L. ROLAND, III

CONSTITUTIONAL LAW—STATE AID TO PAROCHIAL SCHOOLS—A New Jersey statute authorized a township board of education to reimburse parents of public and Catholic parochial school children money expended for transportation on public buses. Plaintiff, a local taxpayer, challenged the statute as being in violation of the First[1] and Fourteenth Amendments of the United States Constitution,[2] by

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20. Ibid. In this case, which involved the question of whose authority, that of the state or the commission, was superior in the regulation of the utility's method of accounting, two members of the circuit court of appeals found a conflict sufficient to invoke the Federal Declaratory Judgment Act. The other member of the court, reasoning in a manner analogous to that advocated in this writing, concluded that there was no conflict justifying the application of the act. The case is now pending in the United States Supreme Court.

21. United States v. Southeastern Underwriters' Ass'n, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

22. 59 Stat. 33 (1945), 15 U. S. C. A. § 1011 (1945).

23. For an interesting commentary on this situation see Comment (1946) 30 Marquette L. Rev. 77-97.

24. 94 U. S. 113, 24 L. Ed. 77 (1876).

1. The First Amendment is now applicable to the states by transmission through the Fourteenth: Schneider v. State, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81 (1942); Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1943); Thomas v. Collins, 323 U. S. 516, 530, 65 S. Ct. 315, 322, 89 L. Ed. 430 (1944); West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639, 63 S. Ct. 1178, 1186, 87 L. Ed. 1628, 1638, 147 A. L. R. 674, 682 (1943).

2. The problem of state support of religious schools and the teaching of religion in public schools has received considerable attention in recent years. See cases collected in 14 L. R. A. 418 (1892), 5 A. L. R. 879 (1920), 141 A. L. R.

its contravention of the proscription against support of a church by the state[3] and by its denial of due process in the taking of private property by taxation for a non-public purpose.[4] The Supreme Court in a five to four decision held the New Jersey statute constitutional against both objections. *Everson v. Board of Education of Ewing Township,* 67 S. Ct. 504, 91 L. Ed. 472 (U. S. 1947).

The whole court appeared to be in agreement on the general principles applicable. The due process challenge was resolved on the ground that the statute was within the wide discretion that a state legislature is deemed to have in declaring what it considers a public purpose[5]—the promotion of education in this case being in the general interest of the state.

With respect to the First Amendment the whole court accepted the proposition of the separation of church and state as the very foundation of religious freedom. As formulated in the majority opinion, "Neither [the federal government nor the states] can pass laws which aid one religion, aid all religions, or prefer one religion over another."[6]

The court diverged sharply, however, in applying this rule to contributions from tax funds to defray the cost of bus fares of children attending parochial schools. The factor ignored by the majority, according to the dissenting justices, was the relationship of the parochial schools to the church in the light of the provisions contained in the Canons with respect to the education of children.[7]

It is undoubtedly a fundamental tenet of our society that edu-

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1148 (1942). See also Johnson, The Legal Status of Church-State Relationship in the United States (1934); Thayer, Religion in Public Education (1947); Note (1941) 50 Yale L. J. 917.

3. The First Amendment commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . "

4. Although even the majority opinion virtually admitted that as the statute now stands it violates the "equal protection" clause as it provided for payment of Catholic and public school children's transportation only, excluding all other private or sectarian schools, the court refused to consider the violation as it was not alleged.

The four dissenting justices would have stricken the statute down on this ground alone, but preferred to base their principal objection on the issue of the separation of church and state.

5. Green v. Frazier, 253 U. S. 233, 240, 40 S. Ct. 499, 501, 64 L. Ed. 878 (1920).

6. 67 S. Ct. 504, 511, 91 L. Ed. 472, 480 (U. S. 1947).

7. Under the ruburic "Catholic Schools," the Canon Law of the Church by which all Catholics are bound, provides: "1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place. . . . (Canon 1372.)"

cation is a public function and hence a primary responsibility of the community. Nonetheless, in the case of *Pierce v. Society of Sisters*[8] it was held that a state could not preclude parochial schools meeting specified educational requirements from discharging that function. A natural corollary urged is that in carrying out that educational function the parochial schools are entitled to reimbursement in full. The majority opinion, while giving some comfort in this respect, is carefully phrased to avoid such an extreme.

The decision concludes that the bus fare tax falls into the same category as tax money spent to maintain sidewalks, streets and sewers and to furnish police and fire protection to churches and church schools as well as to all other property owners.[9] The minority argues that a comparison with general appropriations concerning matters of common right does not support a direct appropriation to pay bus fare to a parochial school; that the First Amendment "forbids support, not protection from interference or destruction."

The majority concludes that the child alone is benefitted by the free bus rides.[10] The dissenters argue that aid to children to attend a school is in fact an aid to that school; that transportation, like teachers' salaries, the expense of classrooms, et cetera, is only one factor in general school expense and indistinguishable in principle.[11]

The conclusion that the transportation serves to protect the children's safety by elimination of the dangers to which pedestrians or hitchhikers are exposed[12] is denied by the dissenters as not supported by the facts of the case, because here the transportation is furnished on regular city buses and the children are subjected to the same hazards and delays of the public generally.

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8. 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468 (1925).

9. Argument used successfully in Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946).

10. Argument successfully employed in Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946); Nichols v. Henry, 301 Ky. 434, 191 S. W. (2d) 930 (1946); Tyrie v. Board of Education of Baltimore County, Maryland Circuit Court 1937; Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 Atl. 628 (1938); Adams v. St. Mary's County, 180 Md. 550, 26 A. (2d) 377 (1942); Judd v. Union Free School District No. 2, 164 Misc. 889, 300 N. Y. Supp. 1037 (1937).

11. On this ground state transportation was declared unconstitutional in State ex rel. Traub v. Brown, 36 Del. 181, 172 Atl. 835 (1934); Sherrod v. Jefferson County Board of Ed., 294 Ky. 469, 171 S. W. (2d) 963 (1942); Gurney v. Ferguson, 190 Okla. 254, 122 P. (2d) 1002 (1941); Judd v. Board of Ed., 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789 (1938).

12. Partial basis for decision in Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946); Nichols v. Henry, 301 Ky. 434, 191 S. W. (2d) 930 (1946).

The majority of the justices felt that a denial of free transportation to parochial or other sectarian school children on the sole basis that they attend a sectarian school would be discrimination against religion;[13] the dissenters point out that there can be no legal discrimination where the public schools are open to everyone and that the denial of state support of a church cannot be called discrimination when it is specifically forbidden by the "support" clause of the First Amendment.

The dissenters emphasize that the "support" clause of the First Amendment embodies the principle of "absolute" separation of church and state of which Madison and Jefferson were the leading proponents.[14] It was their firm conviction that religious freedom flourishes in a free society only and that a tax compelling a believer or non-believer to support a religious institution of any kind, whether one's own or another's, struck at the very basis of the free society. They argued that the first effect of the slightest breach of the principle is to instill religious controversy into public life and that the long range effect of the most minute state subsidization is eventual state control, leading to the establishment of the most politically powerful sect and discrimination against all others.[15] In short, religious persecution replaces religious liberty. The same First Amendment, however, denies the state the power to prohibit the free exercise of religion. The extent to which the courts have applied the "free exercise" limitation is demonstrated by the Jehovah's Witness cases.[16]

Is there a moral obligation on the state, its educational function having been assumed by a volunteer group, to contribute to the financial advancement of this group by furnishing its school children with the same material advantages accorded pupils of public schools? That there is such an obligation and that it should be discharged is

13. Partial basis for decision in Judd v. Union Free School District No. 2., 164 Misc. 889, 300 N. Y. Supp. 1037 (1937).

14. The First Amendment intended to embody the same objective and protection as the "Virginia Bill for Religious Liberty"—Reynolds v. United States, 98 U. S. 145, 164, 25 L. Ed. 244, 249 (1878); Watson v. Jones, 80 U. S. 679, 20 L. Ed. 666 (1872); Davis v. Beason, 133 U. S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637 (1889).

Jefferson was author of the Virginia statute and it came as the result of Madison's Memorial and Remonstrance (II Writings of James Madison 183) against a proposal for the renewal of Virginia's tax levy for the support of the established church.

15. These principles are paraphrased from Madison's Memorial and Remonstrance (II Writings of James Madison 183).

16. West Va. State Board of Ed. v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A. L. R. 674 (1943).

supported obliquely by the principle of the free exercise of religion, since denial of equal financial aid to a religious school carrying out a public function is in a sense an obstacle to the free exercise of that religion. However, the obligation, if admitted, cannot be discharged if it contravenes the proscription against state support of religion.

There are several distinctions that may be drawn in analyzing apparent state aid to religion. For example, a state law which makes church property immune from taxation,[17] being a passive aid, might be deemed not support in law; on the other hand a direct state appropriation for the same amount of money that is thus saved, being an active aid, would be unconstitutional. The same distinction might be drawn between fire and police protection and the payment of bus fare.

A further difference lies between direct and indirect aid. Thus, state furnished transportation to a church school might be constitutional as only indirect aid to the school, although payment of the teachers' salaries would be considered as direct and prohibited. The same yardstick might take the guise of a "material or immaterial" test, allowing state measures which only slightly aid the school, forbidding more substantial help.[18]

A third demarcation might be made between sectarian and nonsectarian aid. In that case furnishing of secular textbooks[19] could be deemed state aid only toward the discharge of the school's public educational function whereas religious textbooks would cross the line into the unconstitutional zone.

Thus secular textbooks, an active aid much more direct and material than free transportation, may more clearly be allowed under the "support" clause limitation than free transportation, which by its

17. Tax exemption for Catholic schools is available in varying degrees in all states but California. In California only sectarian colleges are tax exempt. Gabel, Public Funds for Church and Private Schools (1937) 760-761.

18. The minority expressed great fear of allowance of the slightest state aid of religion as the first breach of the principle, paving the way for more serious violations. In the words of Madison, " . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." (II Madison, 183, 185-86).

19. This is the first time that the First Amendment issue has been squarely presented to the Supreme Court. Free state textbooks for Louisiana parochial schools were upheld by the Supreme Court of the United States in Cochran v. Louisiana State Board of Ed., 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913 (1930), but the only issue presented in the briefs was whether the state's action involved a public or an exclusively private function under the due process clause of the Fourteenth Amendment.

nature is not directed solely at the secular phase of the school's general program. A possible compromise would be to make transportation payments to church school children only a percentage of that granted to public school children in recognition of the school's mixed character. The question of whether state transportation to a parochial school constitutes "support" in law involves a question of fact and might well have gone either way.[20] The majority, while affirming that the Court could not approve the slightest breach of the high and impregnable wall erected between church and state by the First Amendment, concluded that New Jersey had not breached it here. To the minority the decision was an only too vivid reminder of Julia who, according to Byron's reports, "whispering 'I will ne'er consent'—consented."

Delineation of the boundary line between state aid which constitutes "support" in law and that which does not must await further decisions involving varying degrees of aid in fact.

JOSEPH H. STEPHENS

INCOME TAXES—MINES AND MINERALS—SEPARATE AND COMMUNITY PROPERTY—Oil bonuses and royalties were received from a lease on the separate property of the husband. The husband and his wife divided these items equally in their tax returns. No prenuptial agreement existed concerning the income from separate and community property. Held, an oil and gas lease is a dismemberment of the realty amounting to a partial alienation, and the bonus, paid in part consideration therefor, belongs to the separate estate of the husband. As royalty is a share of the product reserved by the lessor, it is not a "civil fruit" and hence does not become a community asset.[1] *Commissioner of Internal Revenue v. Gray,* 159 F. (2d) 834 (C. C. A. 5th, 1947).

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20. Perhaps the majority were partially motivated by the possibility that a contrary decision might place the court in an embarrassing position should the constitutionality of the G. I. Bill of Rights, a popular and beneficial federal law, be similarly attacked. It is common knowledge that the federal measure is a substantial aid to many denominational colleges. Payment of tuition, fees, cost of textbooks and living expenses is clearly a more active, direct and material aid to a college than free bus fare is to a parochial school. Since higher education is not compulsory, the argument that the college is discharging a public function is not as strong as in the case of parochial schools. Possible distinctions might be the comparative emphasis on religion in the two types of schools, or the emergency character of the G. I. Bill of Rights.

1. In two recent cases the Federal District Court for the Eastern District of Louisiana reached a result contrary to the decision of the present case by