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Miscellanea

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Miscellanea

Supreme Court Decision on Bus Issue

On the New Jersey bus-transportation case the Supreme Court split five to four. The majority (Justices Black, Vinson, Reed, Murphy, and Douglas) upheld the State statute which permits the use of tax-raised funds for the transportation of children attending Catholic schools. The court held that there had been no violation of the Constitution. The minority (Justices Rutledge, Frankfurter, Jackson, and Burton) expressed vigorous dissent.

1. The Majority Opinion

Mr. Justice Black, speaking for the majority, set forth the case in litigation. The New Jersey legislature passed a law authorizing local school districts to contract for the transportation of children to and from school. Thereupon a township school board authorized reimbursement to parents of money spent for the transportation of their children in publicly operated busses. Among the beneficiaries were parents who sent their children to Catholic parochial schools. Arch Anderson, in the capacity of taxpayer, filed suit in a State court, contending that both the State and the Federal Constitutions had been violated. The court sustained the appellant in his contention, but the New Jersey Court of Errors and Appeals held that there had been no violation of either the State or the Federal Constitution. The case went to the Supreme Court on appeal. According to charges brought by the appellant, the statute and resolution based on it "Authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes." This is said to violate the "due process clause" of the Fourteenth Amendment. Again, "the statute and the resolution forced inhabitants to pay taxes to help support . . . schools which . . . teach the Catholic faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment."

The Constitutional "due process clause" is said to have been violated "because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children." But, says the court, "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need" (the New Jersey legislature has decided that free bus transportation of parochial school children serves a public need). "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." Legislation is cited which has to do with the

granting of subsidies and loans to farmers and others, and also with the reimbursement of parents for the payment of transportation to and from school.

With respect to the other phases of the due process argument the appellant charged that "taxation for transportation of children to church schools constitutes support of a religion by the state." In this case there is a violation of the First Amendment, which prohibits the state from making any law "respecting the establishment of religion." The court replied by first determining the meaning and extent of the "establishment of religion" clause and then applying these principles. "New Jersey cannot consistently with the 'establishment of religion clause' of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans . . . or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." The First Amendment does not prohibit New Jersey from providing free bus transportation to parochial school pupils as a part of a general welfare program. Undoubtedly free transportation, like police protection, is an aid to children in attending a church school. Without this and other provisions some parents would probably be unable to send their children to the school of their preference. "But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be an adversary."

The decision of the court is further strengthened by the bearing compulsory education laws have on the issue. "This court has said that parents may in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. It appears that these parochial schools meet New Jersey's requirements. 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."

"The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." It will be noted that Mr. Justice Black upholds the principle of separation of Church and State, but is careful to draw a line of distinction between state aid to church schools and the general public welfare program which is intended to serve children regardless of their religious beliefs.

2. The Minority Opinion

Mr. Justice Rutledge rejects the interpretation of the majority and takes a stand in favor of absolute separation of Church and State. He says: "This case forces us to determine squarely for the first time what was 'an establishment of religion' in the First Amendment's conception; and by what action to decide whether New Jersey's action violates its command." The purpose of the amendment was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." The Amendment protects every individual and group in the free exercise of religion in any and every form. It prohibits state aid and guarantees religious freedom to all. "Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or support. Denial or abridgement of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference."

Today, "apart from efforts to inject religious training or exercises into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through the use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function." (Parochial schools fall under this classification.)

"Does New Jersey's action furnish support for religion by use of taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be given to support another's religious training or belief or indeed one's own. Today as then the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end." In this case the parents pay for the transportation of their children to parochial schools, and tax-raised money is used to reimburse them. This not only helps the children get to parochial schools, it helps them get "religious training and teaching." Believers of all faith and non-believers are thus compelled to pay taxes to support a religious faith which they do not espouse.

"New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed, it cannot be said that the cost of transportation is not part of the cost of education or the religious instruction given." Nor can it be argued that the tax money is being used to cover the secular instruction given in religious schools, for parents have

their children transported to such schools precisely because of the religious instruction given there. Here the argument is brought that "transportation, where it is needed, is as essential to education as any other element." It is just as essential as school books, lunches, athletic equipment, and writing material. If transportation is just as essential as these other elements of the school program, the aid thus given is "outlawed." No rational line can be drawn between payments for such larger, but not more necessary, items and payment for transportation. The only line that can be drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure.

The argument that free transportation is a part of the public welfare program has no weight. It destroys the force of the Amendment, and "then there could be no possible objection to more extensive support of religious education in New Jersey." There is no reason why the State should refuse to "make full appropriation for support of private, religious schools just as is done for public instruction." The view of the majority therefore contradicts the whole purpose and effect of the First Amendment as heretofore conceived. "This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction. Today as in his time 'the same authority which can force a citizen to contribute three pence only . . . for the support of any one religious establishment, may force him' to pay more; or 'to conform to any other establishment in all cases whatsoever.' And now, as then, 'either . . . we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred.'"

Finally, "two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid of various private religious schools. In my opinion both avenues were closed by the Constitution. Neither should be opened by this court."

3. Remarks

The disagreement of the members of the Supreme Court on this issue is due to a sharp divergence of opinion regarding the interpretation of the First Amendment. Inherent in the First Amendment is the principle of separation of Church and State. The majority entertains a broad or modified view of separation of Church and State. The minority has taken a stand for absolute separation of Church and State.

Let us consider the broad or modified view. Within this interpretation the state may have recourse to religion to the extent

that there is no violation of the religious freedom of individuals or groups. Bible reading without comment in the public schools is a case in point. "Separation of Church and State means religious liberty. It does not mean that government is completely dis-associated from religion" (National Education Association, Research Bulletin XXIV, No. 1, p. 7). Lutherans, in so far as they sanction chaplaincies, entertain the modified view of separation of Church and State. We entertain this view also in so far as we distinguish between the social welfare program and the instructional program. Three years ago Synod adopted a statement on "State Support of Church Schools," in which the distinction is made between the social service program (library service, lunches, health service, transportation, etc.) and the teaching program of the state. All children attending public or parochial schools are entitled to the benefits of the social service program. Relative to state aid the statement says: "We as citizens should not agitate for state support but oppose the granting of state funds for sectarian use" (*Proceedings*, 1944, pp. 131-134). Let us note that Synod's statement and the majority opinion of the Supreme Court are in agreement.

Now let us glance at the minority opinion. Although absolute separation of Church and State has never obtained in the United States, the minority believes that theirs is the only legitimate interpretation of the First Amendment. In taking this stand they draw an absolute line of cleavage between the sacred and the secular. Consistently adhered to, this stand would require that the practice of Bible reading without comment be banished from all public schools, although the courts have rather consistently held that the practice is constitutional. Church-supported religious instruction, as now carried on in some localities in the schools, likewise released-time religious instruction, would be prohibited. The National School Lunch Act, whose benefits our own parochial schools have shared, would be unconstitutional. Most of us will hardly agree with Mr. Justice Rutledge when he says that textbooks, lunches, and transportation are essential in the same sense that salaries, buildings, and equipment are essential. In our opinion the schools will function even when parents are required to purchase textbooks and provide lunches and transportation for their children. Our schools have availed themselves of the lunches and of transportation provided by the state because we believe that these things belong to the social welfare program and, if granted to one group, should be granted to all groups without discrimination. We believe, therefore, that the distinction which Mr. Justice Black makes between the social welfare program and the instructional program is a valid one. If the distinction is valid, the arguments of the dissenting Judges lose their force. There has been no violation of the Constitution. The use of tax-raised funds to promote a social welfare program for all children attending public and parochial schools does not infringe upon the religious liberty of anyone. In conclusion, it might be well to observe that the divergence of

opinion revealed in the settlement of this issue reflects a division of opinion among American citizens generally with respect to the principle of separation of Church and State.* This difference of opinion exists also among Lutherans. It is too much to hope for complete agreement one way or the other. The individual is free to take his stand in favor of either opinion. A. C. MUELLER

Spurgeon on the Old Gospel

An article in the *Watchman-Examiner* of January 2 calls Spurgeon the greatest preacher since the days of Paul and the beloved defender of the doctrines of grace. It is asserted that Spurgeon proclaimed the evangel to 10,000 people every Sunday, yet never strayed from the simplicity of the Gospel. He is quoted as saying: "Brethren, that is all we have to preach, it is all we want to preach—it is all the ground of confidence which we have for ourselves, it is all the hope we have to set before others. I know that in this age there is an overweening desire for that which has the aspect of being intellectual, deep, and novel; and we are informed that there are to be developments in religion even as in science; and we are despised as being hardly men, certainly not thinking men, if we preach today what was preached two hundred years ago. Brethren, we preach today what was preached 1,800 years ago; wherein others make alterations they create deformities, and not improvements. The old truth of Christ alone is everlasting; all else has gone or shall go, but the Gospel towers above the wrecks of time: to say 'Jesus only' remains as the sole topic of our ministry, and we want nothing else."

Another word of his is quoted: "The sum and substance of the Gospel lies in that word 'substitution' — Christ standing in the stead of man. The Gospel is this: I deserve to be lost forever; the only reason why I should not be damned is that Christ was punished in my stead, and there is no need to exact a sentence twice for sin. I cannot enter heaven without a perfect righteousness: I am absolutely certain I shall never have one of my own. But, then, Christ had a perfect righteousness, and He said, "There, poor sinner, take My garment and put it on; I will suffer in your stead, and you will be rewarded for the works you did not do, but which I did for you." A.

* EDITORIAL NOTE: Groups like the Baptists and periodicals like the *Christian Century* have violently opposed the majority opinion because they fear an insidious attempt on the part of the Roman Catholic Church to use the social service program as a guise to obtain financial support for the educational program of their parochial schools. There are many who believe that this is but the "camel's nose."