SUBJECT INDEX.

TABLE OF CASES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946.

NO. 52.

ARCH R. EVERSON, *Appellant,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL., *Appellees.*

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

PETITION FOR REHEARING.

On behalf of Appellant, Arch R. Everson, we respectfully petition the Court to reconsider the application of the principles announced by the majority in interpreting the First Amendment, to the exact facts, and particularly the precise wording of the Resolution, which is the definitive act of the State of New Jersey drawn in question in this case.

I.

The resolution of the Board of Education in this case is set forth in the record and in the briefs. This was the resolution under which the payment of fares to the parents of children attending certain schools in an adjoining school district was authorized and made. The resolution distinctly and unequivocally provided that the Board should bear the expense of the transportation of children to certain "Catholic schools"—so named and designated in the resolution. Here is the record:

> (Page 7) "To the Honorable the Justices of the Supreme Court of Judicature of New Jersey:
>
> "I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, in obedience to the command of the writ hereto annexed, directed to the said The Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify and send to you, the said Justices, the proceedings, records, and papers dealing with the certain action of said Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a cost of $859.80, for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof." * * *
>
> (Page 8) "I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify that at a regular meeting of The Board of Education of the Township of Ewing, in the County of Mercer, on September 21, 1942, the following action was taken in accordance with the minutes of said meeting:
>
> "'The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carrier as in recent years. On motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted.'" * * *

(Page 13) "Q. Do you have a record of any payments made to parents to reimburse them for the cost of transportation of pupils from the Township of Ewing to parochial schools in the city of Trenton?

A. I do.

Q. When were those payments made?

A. They were made the first five months and second five months' period. They are made about February, after January's attendance comes in. It is somewhere around the middle of February, or the 15th, when they go out.

Q. Will you, please, refer to your records and tell me whether you have a record of pupils from the Township of Ewing attending St. Hedwig's parochial school in the City of Trenton?

A. I do.

Q. Will you, please, give us a list of the payments made for transportation of such pupils from Ewing Township to that school, giving the name of the parent, the name of the pupil and the amount?" * * *

(Page 14) "Q. Will you, please, refer to your records again and tell me whether you have a record of payments made to parents to reimburse them for cost of transportation of their children from the Township to the Catholic Boys' High School in the City of Trenton?

A. Yes, I have that record." * * *

(Page 18) "Q. Can you refer to your minutes and tell us when they were authorized?

A. The minutes show on Monday, February 15, 1943, the *Board authorized the payment of a transportation bill* for the first half of high school and elementary at Trenton, to the amount of $8,034.95.

Q. Did that sum of $8,034.95 include the payment to the people whose names you read off and the amounts?

A. Yes, it did." * * *

(Page 20) "Q. How are they reimbursed for that cost of transportation?

A. By *report of the high school* on their monthly attendance, which I check on the back of these cards and at the end of five months it is added up and they are paid according to what it costs, 22 cents a day or 20." * * *

(Page 23) "Q. Are Catholic Boys high school and St. Mary's Cathedral high school, St. Francis school, St. Hedwig's parochial school all Roman Catholic parochial schools in the City of Trenton?

A. They are.

Q. Father Endebrock, are you familiar with the curricula in those schools?

A. Yes.

Q. Is religion taught as part of the curricula?

A. Yes, it is.

Q. In each one of the schools that I mentioned?

A. Yes." * * *

(Page 51) From the decision of the New Jersey Court of Errors and Appeals:

"We conclude that there is nothing on the face of the resolution or statute or in the record before us showing that either the statute or the *resolution enacted thereunder* is unconstitutional or does violence to the Constitution for any of the reasons urged." (Italics supplied)

This particular action of the School Board (and not some general plan for transportation of children) is the precise matter which is brought to the attention of the Court on this appeal, and no other or different action. This resolution (as well as the act of the local school board) was sustained by the highest court of the state as being within the laws of the state and not contrary to the constitution of that state or of the United States.

That such a resolution of local authorities, so upheld by the highest state court, is itself a *law of the state,* the validity of which may be challenged on appeal to this Court on the ground of its being repugnant to the Constitution of the United States is well settled in the decisions of this Court. *Reinman* v. *Little Rock,* 237 U. S. 171; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548. Those cases hold that a municipal ordinance is to be regarded as in effect a statute of the state, adopted under a power granted by the state legislature, and hence it is an act of the state within

the Fourteenth Amendment.[1] And like effect was given to a resolution of a School Board in *Board of Education* v. *Barnette*, 319 U. S. 624 and other recent cases.[2]

If it be assumed, for the purposes of this argument only, that it would be within the power of the state or the local

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[1] In *Reinman* v. *Little Rock*, 237 U. S. 171, it is said:

> "The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the law-making power of the State; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of Judicial Code, sec. 237, which confers jurisdiction upon this court."

In *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, it is said:

> "We must, therefore, treat the ordinances as legislation enacted by virtue of the law-making power of the State. They are manifestly an exertion of the police power, and the question is whether, viewed in that light, they run counter to the 'contract' or 'due process' clauses."

See also *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, where the ruling in the above cases is expressly approved; and also *Jamison* v. *Texas*, 318 U. S. 413, 414, where the ruling is shown to be now firmly established.

[2] In the opinion in*Board of Education* v. *Barnette*, 319 U. S. 624, there is shown the precise act of the State which was the subject of the Court's decision. At page 625 it is said:

> "The West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State 'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.' Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to 'prescribe the courses of study covering these subjects' for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study 'similar to those required for the public schools'."

authorities to provide a broad general plan for the relief or protection of children on the public highways, or of school children necessarily using such highways—that is not the case here presented.

The *resolution* which was before the Court is also set forth:

> "The Board of Education on January 9, 1942, adopted a resolution * * * ordering that the salute to the flag become 'a regular part of the program of activities in the public schools.' that all teachers and pupils 'shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly'."

In the majority opinion of the Court it is said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

In *Minersville District* v. *Gobitis*, 310 U. S. 586, the precise matter before the Court is also set forth. At pages 587 and 589 there are summarized the contentions of the parties: "The resolution of the School Board requiring pupils to salute the flag was lawfully adopted, and the expulsion of the children was within its power and authority." * * *

> "The rule compelling respondents to participate in the ceremony of saluting the flag and the act of the School Board in expelling them because they refrain, violate their rights guaranteed by Art. 1, Sec. 3, of the Constitution of Pennsylvania and the Fourteenth Amendment of the Constitution of the United States."

In the opinion, p. 591, it is said:

> "Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. The *local Board of Education* required both teachers and pupils to participate in this ceremony."

The *Gobitis case* was overruled on the merits (the constitutional question) but in both cases the action, upon which the decision of validity or invalidity turned, was the resolution of the School Board—in one case the State School Board and in the other case the local School Board.

The confinement of the issue to the precise case presented is important, not because there is or is not raised the question of discrimination or a violation of the equal protection clause of the Constitution, but because—regardless of the view as to the person or object really benefited—the resolution makes plain that the financial benefit here conferred is directed and given to adherents of a particular religion—the Catholic religion, so named and designated.

Whether this is a "public purpose" need not be argued. The First Amendment to the Constitution, now made applicable to the states by the Fourteenth Amendment, has answered this question by saying that it shall *not* be a public purpose—a purpose as to which the public may concern itself—to make a grant in aid of a particular church as such, or to those professing a particular religious belief as such. Such *aid* is forbidden by the Amendment just as much as a similar *restriction* would be forbidden. This is the minimum requirement of the First Amendment.[3]

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[3] In the majority opinion in this case it is said:

> "The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." * * *
>
> "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." * * *
>
> "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." * * *

II.

If, as this Court has said in interpreting the First Amendment, the "establishment of religion" part of the Amendment is to be given equally broad meaning as the part relating to the free exercise of religion, and both are intended to provide the same protection as that in the Virginia statute, then financial aid from taxpayers' money is on an equal footing with "restriction" on the exercise of religious beliefs.[4] The aid extended by the payment of money to parents sending their children to schools of the particular sect of religion cannot be denominated "public welfare" with which the public may properly concern itself, for the Amendment, as now interpreted by the members of the Court, the majority as well as the minority, makes religious belief and the contributions of money for the propagation of religious opinions, a matter entirely of private concern and without the domain of public affairs.

Of a similar situation this Court has said (referring to a "restriction" which we have said is not to be distinguished in principle from "aid") "the mere restriction of liberty or of property rights, cannot of itself be dominated 'public welfare' and treated as a legitimate object of the police power; *for such restriction is the very thing that is inhibited by the Amendment.*" (*Coppage* v. *Kansas,* 236 U. S. 1, 19).

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[4] In the majority opinion in this case, at p. 11, it is said:

> "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

The preamble to the Virginia Statute provided:

> "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical;" * * *

Here again we must refer to the Resolution which is before the Court; "the transportation of pupils of Ewing to the * * * Trenton Catholic Schools."

There is no precedent in this Court, in any of the decisions on the subject heretofore rendered, for so treating, as "public welfare," aid to religious organizations or to persons adhering to religious organizations.

Of course, education in general is a matter of public concern and the states have given it concern, providing for it in many ways, by building schools, both elementary and high schools, employing teachers and paying their salaries from public funds, furnishing transportation to and from schools, furnishing recreational and physical culture facilities, classroom apparatus, school books, etc. And no one has denied the constitutionality of such acts, as Mr. Justice Holmes has said in *Interstate Ry.* v. *Massachusetts,* 207 U. S. 79, though with his usual caution he very carefully refers to *public schools* only.[5] But if this public concern and the use of pub-

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[5] In *Interstate Railway Co.* v. *Massachusetts,* 207 U. S. 79, the question before the Court was stated as follows:

> "This was a complaint against the plaintiff in error for refusing to sell tickets for the transportation of pupils to and from the public schools at one-half the regular fare charged by it, as required by Mass. Rev. Laws, c. 112, sec. 72."

Mr. Justice Holmes in his opinion said:

> "And, to return to the taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt. The present requirement is not different in fundamental principle, although the tax is paid in kind and falls only on the class capable of paying that kind of tax—a class of *quasi* public corporations specially subject to legislative control." * * *

This language must be taken in connection with the definition of "public schools" in the decisions in Massachusetts, for example in *Jenkins* v. *Andover,* 103 Mass. 74, as: "Schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education and

lic funds are to be extended to Catholic schools or to Baptist schools, for example, or (which is in logic the same thing) to the children because they attend Catholic schools or Baptist schools, then logically, assuming the premises we have given, this aid cannot be limited to furnishing transportation.

Certainly no support is given to such application of the "general welfare" doctrine by the case of *Bradfield* v. *Roberts,* 175 U. S. 291. In that case the opinion of the Court was wholly based upon the proposition that the hospital there used for which compensation was granted by Congress was a private corporation and not a religious organization, the Court saying that the affiliations of the particular stockholders who from time to time might own the stock in that corporation would not change its character.

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which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system; * * *

> "This class of school does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality."

If, as is everywhere conceded (and stated by the majority in the instant case) it is a valid, constitutional exercise of power to confine the transportation of school children to those attending *public schools,* such action does not at the same time become unconstitutional because, being confined to public schools, it excludes private schools, religious or otherwise.

Indeed, if this were a "restriction" instead of a "benefit" it might well be said that what was clearly in the interest of "public welfare" and constitutional as to children in public schools might well be unconstitutional, (though the general purpose be the same) if extended expressly to private and parochial schools. See *Bartels* v. *Iowa,* 262 U. S. 404, at p. 413, last sentence of opinion by Mr. Justice Holmes: "I agree with the Court [holding the law unconstitutional] as to the special proviso against the German language contained in the statute dealt with in *Bohning* v. *Ohio.*" The special proviso referred to, read as follows: "provided that the German language shall not be taught below the eighth grade in any such schools [private and parochial schools] within this state."

The very emphasis on the non-religious character of the institution leads inevitably to the conclusion that had the fact been otherwise the decision likewise would have been different. The inference is plain that no theory of general welfare would have justified a grant to a religious organization.[6]

So of the case *Quick Bear* v. *Leupp,* 210 U. S. 50. In that case the sole question before the Court was whether the funds granted were public monies of the United States or monies of the Indians. The Court held that the funds involved were not public funds in the sense in which those words are understood, that is, as meaning public funds for the general use of the state and for the exercise by the government of its Police Power. This being the basis of the opinion, it clearly negatives any thought that a grant of public funds to Catholic Indian Missions would be valid.[7]

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[6] From the opinion in *Bradfield* v. *Roberts,* 175 U. S. 291, at 297:

> "If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."

[7] From the opinion in *Quick Bear* v. *Leupp,* 210 U. S. 50, at 81:

> "But it is contended that the spirit of the Constitution requires that the declaration of policy that the Government 'shall make no appropriation whatever for education in any sectarian schools, should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the Government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use *their own money* to educate their children in the schools of their own choice because the Government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibit the free exercise thereof."

These are the two cases in this Court cited as authority on the question by counsel for the Appellee and they are also cited in the majority opinion. It is not apparent that any of the other cases in this Court cited in the majority opinion lends any support to either side on the particular point we are now discussing.[8]

"General welfare" is part of the "Police Power." The Police Power is broad and being inherent in Government it is aside from the constitutional grant of power to the legislature. But it is not *above* the Constitution; it is subordinate to the Constitution. The limitations in the Constitution are restrictions on the exercise of the Police Power. The very purpose of the First and Fourteenth Amendments was to restrain the Government, State or Federal, in the exercise of sovereignty under the guise of the Police Power. (*Southern Ry. Co.* v. *Virginia*, 290 U. S. 190).[9] If this were not true they would be useless.

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[8] The cases of *Reynolds* v. *United States*, 98 U.S. 145, and *Davis* v. *Beason*, 133 U. S. 333, have no real bearing on the point under consideration. They hold merely that "a crime is none the less so, nor less odious, because sanctioned by what any particular sect may designate as religion."

[9] In *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, at p. 196, it is said:

> "The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the XIV Amendment."

See also *Coppage* v. *Kansas*, 236 U. S. 1, 17, 19, where it is said:

> "And since a State may not strike them [rights under the Fourteenth Amendment] down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

If, as the majority opinion states with reference to the Church, the State must be neutral and cannot become an adversary, by like token it must not commingle the affairs of government with the affairs of the Church as such or of the adherents of a particular sect of the Church as such. This historically is the true meaning of "separation of Church and State" as embodied in the First Amendment as that Amendment is interpreted by the majority of this Court.

"The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of the police power, for such restriction is the very thing that is inhibited by the amendment."

While the authority of the *Coppage case* as applied to problems growing out of national labor relations acts has been denied in recent cases, the cogent reasoning of Mr. Justice Pitney as to the scope of the Police Power remains sound. See *Panhandle Co.* v. *State Highway Com.*, 294 U. S. 613, where it is said:

"A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * * The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire." And see also language of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413: "But obviously the implied limitation [Police Power] must have its limits, or the contract and due process clauses are gone."

The same thought has been aptly expressed by Mr. Justice Stone (see dissenting opinion in the *Gobitis case*, 310 U. S. 586, 604) whose views on the subject then under discussion afterwards prevailed in the *Barnette case*, 319 U. S. 624: "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, * * * The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection."

III.

We therefore respectfully urge two points as grounds for reconsideration: *First:* That on the very principles announced by the majority of the Court as those to be applied in securing the absolute "separation of Church and State" implicit in the First Amendment as now interpreted by this Court, an act of the state (whatever its form—law or ordinance or resolution under law) which does specifically refer to and segregate the church or some sect of religion or the adherents to some sect of religion, as recipients of its grant, should be struck down because it commingles the affairs of the State and the affairs of a particular religious belief.

And, as subsidiary to this: That the resolution of the School Board which does thus commingle the affairs of the State and Church—the public schools and the Catholic schools—by particularly providing for transportation to the Catholic schools *is* the act of the state before this Court, challenged on this appeal.

Second: That the act of the state (resolution of the School Board in this instance, held by the state court to be authorized by state law) should not be sustained on the ground that a more general resolution not referring to nor segregating any particular sect of religion or any religion at all—such as police protection, fire protection, transportation of children generally, etc.—might be upheld as an exercise of the Police Power to secure the "general welfare."

And, as subsidiary to this: That, a resolution of the School Board with its direct and exclusive reference to "Catholic Schools" in securing payments for transportation, being before the Court, it is not necessary in order to determine its constitutional validity under the First Amendment to find that there is or is not evidence to show circumstances and conditions which might have called for a different and broader resolution or for one that did not

name a particular sect of religion and its adherents, as the beneficiaries of its grant.[10]

WHEREFORE, Appellant, by his counsel, prays that this Petition for Rehearing be granted and that the mandate herein be not issued until this Court has the opportunity to consider and act upon this Petition.

Respectfully submitted,

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[10] See *Busey* v. *District of Columbia*, 138 F. 2d 595, based on *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, and recent decisions of this Court under the First Amendment, and applying the mandate of this Court (319 U. S. 579): "We think we may now hold that when legislation *appears on its face to affect the use of speech, press, or religion,* and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; * * * The burden of proof in such a case should be upon those who deny that these freedoms are invaded."