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Constitutional Law--Separation of Church and State--First and Fourteenth Amendments (McCollum v. Board of Education, 92 L.Ed. 451 (1948))

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RECENT DECISIONS

CONSTITUTIONAL LAW—SEPARATION OF CHURCH AND STATE—FIRST AND FOURTEENTH AMENDMENTS.—Members of the Jewish, Protestant and Roman Catholic faiths in Champaign, Illinois, formed a voluntary association for religious education. With the permission of the local board of education they offered religious instruction to public school pupils. Weekly classes divided into Jewish, Protestant and Roman Catholic groups and lasting for thirty and forty-five minutes were given in the public school classrooms. The classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend. Pupils were excused from secular studies for the purpose of attending the instructions and those who did not attend were required to continue with their secular studies. Instructors were supplied by the association subject to the approval of the superintendent of schools. All expenses were paid by the association.

Appellant's child did not attend the instructions. As a result he was embarrassed by the attitude of other students toward him and by his separate secular instruction while the religious instruction was being carried on. Appellant brought proceeding for mandamus in Illinois courts to prohibit the teaching of religious education in the public schools.[1] From a judgment denying the writ appeal was taken to the United States Supreme Court. *Held,* the use of tax-supported property for religious education and close cooperation between school authorities and the religious council are unconstitutional under the First Amendment,[2] made applicable to the states by the Fourteenth.[3] *McCollum v. Board of Education,* — U. S. —, 92 L. ed. 451 (1948).

It is to be noted that the Court made no finding that the embarrassment to appellant's child constituted a form of coercion by the state, compelling him to take part in the religious instruction. This, then, is not a case where free exercise of religion has been prohibited as the Court found in the *Jehovah's Witnesses Cases.*[4] The Court here explicitly rests its decision on the unconstitutional aid and cooperation between the state and a religious association.

Where an act of a state or its political subdivision is attacked as an unconstitutional aid to religion it has usually been on two

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[1] People *ex rel.* McCollum v. Board of Education, 396 Ill. 14, 71 N. E. 2d 161 (1947).

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

[3] U. S. CONST. AMEND. XIV § 1.

[4] Cantwell v. Connecticut, 310 U. S. 296, 84 L. ed. 1213 (1940); Board of Education v. Barnette, 319 U. S. 624, 87 L. ed. 1628 (1943). *But cf.* Minersville District v. Gobitis, 310 U. S. 586, 84 L. ed. 1375 (1940).

grounds: (1) That a state cannot tax some people to support the private purposes of others. (2) That a state cannot legislate respecting the establishment of a religion.

The first argument is made under the "due process" clause of the Fourteenth Amendment [5] and would seem to need no other support. In the instant case there was no expense to the state and the state court found that any additional wear and tear on the school building caused by the program was inconsequential and within the *de minimis* maxim.[6] The opinion of the Supreme Court seems to contain nothing to the contrary, therefore this argument should not apply.

The second argument is an application to the states of the First Amendment which was originally a guarantee of freedom as against the Federal Government only.[7] However, since the Fourteenth Amendment prohibits a state from abridging privileges and immunities of citizens of the United States, the Supreme Court has held that the First Amendment now applies also to the states.[8]

What then is the "aid" prohibited by the First Amendment? In upholding a state statute permitting reimbursement of parents of parochial school children for the purchase of secular text books, where such books were purchased for public school children,[9] and another state statute permitting payment for transportation of children to parochial schools,[10] the Supreme Court recognized that the mere fact that the practice in question might incidentally, and as a by-product be an aid to a particular sect was not sufficient ground to interfere with a state's police power and its power to act for the general welfare of its citizens. However, in upholding the transportation of parochial school children the Court said: "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. . . ." [11] It will be seen that the inclusion of the phrase, "aid all religions," was unnecessary to the decision. The Court failed to find that the transportation was an unconstitutional aid to one, much less all religions. It is the application of the *dicta* to the present case which gives rise to a serious difficulty. Previously it was considered that the "establishment of religion" clause did not prohibit either state or federal governments from aiding religion in general, provided there was not such an aid as to constitute prefer-

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[5] U. S. CONST. AMEND. XIV § 1.

[6] People *ex rel.* McCollum v. Board of Education, 396 Ill. 14, 71 N. E. 2d 161 (1947).

[7] Permoli v. First Municipality, 3 How. 589, 11 L. ed. 739 (1845).

[8] Everson v. Board of Education, 330 U. S. 1, 91 L. ed. 711 (1947); *accord,* Cantwell v. Connecticut, 310 U. S. 296, 84 L. ed. 1213 (1940); Murdock v. Pennsylvania, 319 U. S. 105, 87 L. ed. 1292 (1943).

[9] Cochran v. Board of Education, 281 U. S. 370, 74 L. ed. 913 (1930).

[10] Everson v. Board of Education, 330 U. S. 1, 91 L. ed. 711 (1947).

[11] *Id.* at 15, 91 L. ed. at 723.

ence of one sect over the others.[12] On the other hand public school regulations which compelled participation in a religious ceremony or favored a particular form of worship were held invalid.[13] Both state and federal governments have traditionally aided religion. The armed services provide church facilities and employ chaplains. Legislatures of both governments employ chaplains. The Supreme Court has held that it was not unconstitutional to exempt clergymen and theological students from military service.[14] What is tax exemption of church property if not an aid?

In the principal case both the majority opinion of Mr. Justice Black[15] and the concurring opinion of Mr. Justice Frankfurter[16] stress the words of Jefferson in speaking of the First Amendment as creating "a wall of separation." In effect it is held that the intent of the Amendment was to prohibit even the encouragement of religion in general. As pointed out by Mr. Justice Reed in his dissenting opinion, both Jefferson and Madison, as officials of the University of Virginia, a state supported and controlled institution, approved regulations by which religious exercises were provided at the university and students were expected to attend.[17]

In the absence of a finding that students were compelled to attend the instructions in question or that a particular sect was favored, it is submitted that the decision is an unwarranted interference with a state function. It ignores the traditional attitude of our state and national governments toward religion, and seems to attempt to crystallize a non-existent public policy of belligerency, or at least fear, toward religion. Conceding that the courts are not to be limited to the use of a dictionary in interpreting the Constitution and admitting that the Constitution must be viewed in the light of present day problems, at the same time its meaning is not to be found in the views of what individual judges think good for education.[18] To attempt to define constitutional rights in the terms of a metaphor

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[12] Zollman, *Religious Liberty in the American Law*, 17 MICH. L. REV. 355, 456 (1919).

[13] People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910).

[14] Arver v. United States, 245 U. S. 366, 62 L. ed. 349 (1917).

[15] McCollum v. Board of Education, — U. S. —, 92 L. ed. 451, 456, 457 (1948).

[16] *Id.* 92 L. ed. at 466.

[17] *Id.* 92 L. ed. at 473, 474.

[18] *Cf.* Minersville District v. Gobitis, 310 U. S. 586, 594, 598, 84 L. ed. 1375, 1379, 1381 (1940), where Mr. Justice Frankfurter, speaking for the Court, said: "The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. . . . But the court-room is not the arena for debating issues of educational policy."

divorced from the sentiments of its author is to subject those rights to the tyranny of words.

The constitutionality of all types of religious instruction programs wherein public school officials cooperate with religious groups is now left in doubt. The practice in New York State is to release pupils from secular studies for periods of religious instruction but no part of the religious instruction is given in public school buildings. It is believed that this fact may be sufficient to exclude the program from the scope of this decision.

Aside from abstract legal principles such decisions may be considered in the light of some extraneous facts. The *Everson* decision [19] met considerable criticism on the ground that it favored the Catholic Church. The present decision followed a year later. It might be said that here we have a decision which treats all religions alike. That is true in so far as it tends to isolate all religion from public school education. It may be that the adverse effect on any particular group will be in proportion to the use which that sect has made of the released time program. However, it is well known that the Catholic Church has a wide-spread system of parochial schools, for which no amount of released time religious education would be a substitute. The effect of the decision may be far more harmful to those sects which do not have a comparable education system.

F. F. G.

CONTRACT—STATUTE OF FRAUDS—SUBSCRIPTION OF MEMORANDUM.—The parties entered into a contract for the sale of real property. The only written memoranda of the sale consists of a check for $500.00 signed by the purchaser (defendant), given as a deposit and a receipt setting forth the terms of the sale signed by the vendor (plaintiff). Thereafter, the purchaser stopped payment on the check and the vendor sold the property to a third person.

The vendor sues for damages for the breach of the contract, consisting of the difference between the contract price and the market value, and for brokerage charges. The defense is the Statute of Frauds. *Held,* defendant's motion for summary judgment granted. The court assumed that the memorandum was a sufficient statement of terms to satisfy the requirements of the Statute of Frauds [1] but nevertheless, held the agreement to be void as not having been subscribed by the party sought to be charged.[2] *Robinson v. Karr,* 273 App. Div. 790, 75 N. Y. S. 2d 460 (2d Dep't 1947).

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[19] Everson v. Board of Education, 330 U. S. 1, 91 L. ed. 711 (1947).

[1] N. Y. REAL PROP. LAW § 259.

[2] As required by N. Y. REAL PROP. LAW § 259, as amended by Laws of 1944, c. 198. Prior to this amendment the statute required an executory con-