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Constitutional Law - First and Fourteenth Amendments - Tuition Payments by State To Sectarian Schools

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NOTES

CONSTITUTIONAL LAW — FIRST AND FOURTEENTH AMENDMENTS — TUITION PAYMENTS BY STATE TO SECTARIAN SCHOOLS

Plaintiff, resident taxpayer, sought a declaratory judgment regarding the constitutionality of action taken by the local school board in making tuition payments on behalf of students attending Roman Catholic secondary schools. The school board's action was taken pursuant to a Vermont statute[1] which provided that the local school boards should either maintain public high schools or provide secondary educational facilities at schools selected by parents of pupils. Rather than maintain a public high school, the board chose to authorize and make payments of tuition to various sectarian (Roman Catholic) schools in the pupils' behalf.[2] Instruction in Roman Catholicism was included in the curricula of the schools involved, but was a required subject only for students of the Roman Catholic faith. The trial court held the payments to be contrary to the Federal Constitution. On appeal to the Supreme Court of Vermont, *held*, affirmed. The payment of tuition directly to religious denominational schools by a school district which maintains no public educational facilities constitutes "establishment of religion" in violation of the first and fourteenth amendments to the Federal Constitution. *Swart v. South Burlington Town School District*, 167 A.2d 514 (Vt. 1961).[3]

The first amendment[4] declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.[5] The United States Supreme Court has

1. VT. STAT. ANN. 16:793 (1958): "(a) Each town district shall maintain a high school or furnish secondary instruction . . . for its advanced pupils at a high school or academy, to be selected by the parents or guardian of the pupil. . . .
"(b) Each town district shall pay tuition but not in excess of $400.00 per pupil per school year. . . ."

2. It does not appear from the court's statement of the facts that any schools other than those under the auspices of a religious denomination were available in the district.

3. The court stated that the resolute history of the religious freedom doctrine of the Federal Constitution seems more demanding than that of the Vermont Constitution; therefore the case would be decided under the federal constitution.

4. U.S. CONST. amend. I.

5. Davis v. Beason, 133 U.S. 333, 342 (1899): "The oppressive measures . . . inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental

declared[6] that the religious guarantees of the first amendment are embraced by the due process clause of the fourteenth amendment.[7] The first amendment prohibits governmental action tending to propagate any or all religion,[8] but at the same time protects the individual's freedom to worship as he pleases.[9] The government is not required, under the first amendment, to be an adversary of religion.[10] To this end, under compulsory attendance laws, a child may attend a sectarian school so long as the secular education there provided complies with state standards.[11] Constitutional problems arise, however, where the state attempts to confer positive benefits on all school children which incidentally inure to schools maintained by religious groups. Broadly speaking, the United States Supreme Court has allowed these benefits where they do not exceed certain limits.[12]

In the landmark case of *Everson v. Board of Education*,[13] the United States Supreme Court upheld as constitutional a New Jersey statute authorizing parents of children attending public, private, and sectarian schools to be reimbursed for school transportation costs from state funds. This holding was foreshadowed by *Cochran v. Board of Education*[14] in which the Supreme Court sustained a Louisiana statute[15] providing for the distribution of standard state textbooks to all public, private, and sectarian school children without charge.[16] In *Cochran*, however, the alleged unconstitutionality was not "establishment of religion" under the first amendment, but use of public funds for private purposes in violation of the due process clause of the fourteenth amendment. The practice of allowing public classrooms to be used for religious instruction during school hours

operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the [first] amendment."

6. Cantwell v. Connecticut, 310 U.S. 296 (1940).

7. U.S. CONST. amend. XIV.

8. Everson v. Board of Education, 330 U.S. 1 (1946).

9. See Zorach v. Clausen, 343 U.S. 306 (1952).

10. Everson v. Board of Education, 330 U.S. 1 (1946).

11. See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

12. Zorach v. Clausen, 343 U.S. 306 (1952); McCollum v. Board of Education, 333 U.S. 203 (1948); Everson v. Board of Education, 330 U.S. 1 (1946).

13. 330 U.S. 1 (1946).

14. 281 U.S. 370 (1930).

15. LA. R.S. 17:351 (1950).

16. Cochran v. Board of Education, 281 U.S. 370 (1930). The court pointed out that the books furnished those children attending private schools were the same books furnished children attending public schools. Quoting from Borden v. Board of Education, 168 La. 1005, 1020, 123 So. 655, 660 (1928), the court stated: "The schools . . . are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries." *Id.* at 375.

was declared unconstitutional in *McCollum v. Board of Education.*[17] However, in *Zorach v. Clausen*[18] the United States Supreme Court upheld a program of *releasing* children from public schools on a voluntary basis to attend religious classes elsewhere. The court distinguished *McCollum* in that there the public classrooms were used for religious instruction and the force of the public school was used to promote that instruction, while in *Zorach* the public schools did no more than accommodate their schedules to a program of outside religious instruction.

The New York Supreme Court, prior to *Everson*, held[19] that a statute authorizing the use of public funds for transportation of pupils to parochial schools could not be upheld on the ground that the purpose of providing such transportation was to promote the interests of the controlling religious or sectarian institutions. In *Almond v. Day*,[20] the Supreme Court of Virginia held unconstitutional a statute authorizing reimbursement of certain parents for amounts expended in paying tuition to religious schools. The court reasoned[21] that such legislation was invalid because it utilized public funds to support religious institutions contrary to the principles set forth in the *Everson* case, because it afforded sectarian institutions an opportunity to reach pupils for the purpose of religious instruction, and because it compelled taxpayers to contribute money for the propagation of religious opinions which they did not necessarily believe.

It has been suggested that the constitutionality of governmental aid to religious schools depends upon whether the aid is "direct" or "indirect."[22] It is contended that when the primary beneficiary of the appropriation is the pupil, the school benefiting only incidentally, constitutional prohibitions have not been violated. However, when the direct benefits of the legislation inure to the religious schools, the result is an "establishment of religion" in contravention of the first amendment. This theory seems to oversimplify the problem. It would seem that when a parochial school receives any governmental aid, "directly" or

17. 333 U.S. 203 (1948). The court reasoned that: "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects."

18. 343 U.S. 306 (1952).

19. Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576 (1938).

20. 197 Va. 419, 89 S.E.2d 851 (1955).

21. *Id.* at 430, 89 S.E.2d at 858.

22. Note, 29 FORDHAM L. REV. 578, 580 (1961): "[C]ourts should look to the competing societal values and to whether the church is the direct or indirect beneficiary of the aid."

"indirectly," the parent religious organization becomes free to divert equivalent funds to other religious purposes, which would normally be expended for the benefit the government provides. A better analysis would seem to be that so long as the form of state aid does not tend to promote secular education tainted by a sectarian world-view, the incidental benefits to the organized religion do not make the aid constitutionally objectionable.

The problem does not appear to be whether or not religious schools are aided, or, if aided, whether the aid is direct or indirect; rather the question appears to be to what extent the program aids secular education which is objectionably colored by sectarian philosophy. Under this theory the *Everson* case may be explained on the ground that the financial assistance provided merely relieved parents of the expense of transporting their children to school. Religious precepts were not thereby imposed on the secular education of the children. Although *Zorach* is more difficult to explain, it is clear that the public education program, as a whole, remained unimbued by religious philosophy. The pupils went elsewhere for religious instruction and sectarian doctrine was not injected into the secular program. But in *McCollum* there was a clear danger of the public education being affected by religious philosophy where religious instruction was being offered in the public school buildings during school hours.

The instant case[23] held that the payments of tuition directly to religious schools by a school district which maintains no public educational facilities constitutes an "establishment of religion" in violation of the Federal Constitution. This substantial departure from the principle that education provided by the state should not be tainted by sectarian philosophy would seem to accord with similar results reached by the United States Supreme Court in the decisions analyzed above. Since education administered by a religious order would seem effectively to preclude neutrality, it is submitted that the court in the instant case reached a proper decision.

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23. Swart v. South Burlington Town School District, 167 A.2d. 514 (Vt. 1961).