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Constitutional Law- Freedom of Religion- Tuition Payments to Parochial Schools Violate Fourteenth Amendment

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RECENT DECISIONS

CONSTITUTIONAL LAW — FREEDOM OF RELIGION — TUITION PAYMENTS TO PAROCHIAL SCHOOLS VIOLATE FOURTEENTH AMENDMENT — Because defendant school district did not maintain a high school within the school district, tuition payments were made, as provided by statute,¹ to the high schools attended by pupils residing within the district. The parents of each student selected the high school to be attended. As a result of this program, some tuition payments were made to high schools operated by the Roman Catholic Church. Plaintiff taxpayer sought in a declaratory judgment a determination of the validity of tuition payments made to Catholic high schools under the United States Constitution² and the Constitution of Vermont.³ The court of chancery held the payments unconstitutional. On appeal, *held*, affirmed. The payment of tuition to a religious denominational school by a public entity constitutes an "establishment of religion" in violation of the fourteenth amendment of the United States Constitution.⁴ *Swart v. South Burlington Town School Dist.*, 167 A.2d 514 (Vt. 1961).

The United States Supreme Court has held that the fundamental rights embodied in the due process clause of the fourteenth amendment embrace the religious guarantees of the first amendment,⁵ but the Court has not yet fully defined what constitutes an "establishment of religion."⁶ While some of the language used in the Court's opinions would suggest that an absolute separation must exist between church and state,⁷ this idea has never been applied to the facts in any particular case.⁸ In fact, the Court has permitted the state to provide books⁹ and transportation¹⁰ to parochial school children on the theory that such payments are not an establishment of religion but rather the legitimate promotion of the secular education and well-being of the children. However, the financing of religious institutions and religious teaching does constitute the "establishment of religion."¹¹

¹ VT. STAT. ANN. tit. 16, § 793 (1958).

² U.S. CONST. amend. I.

³ VT. CONST. art. 3, ch. 1.

⁴ The lower court held that the prohibitions under the United States and Vermont Constitutions were identical. The Vermont Supreme Court reached its decision in the principal case solely on the basis of the United States Constitution. Since the tuition payments would be void if there was a violation of either constitution, the Court based its holding on the United States Constitution which it felt contained more stringent constitutional limitations. Principal case at 518.

⁵ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁶ See generally KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* (1956); O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949); Corwin, *The Supreme Court as a National School Board*, 14 *LAW & CONTEMP. PROB.* 3 (1949).

⁷ *Everson v. United States*, 330 U.S. 1 (1947); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

⁸ Even in the *McCullum* case (p. 211) the Court refused to adopt completely the idea of absolute separation, because it cited with approval the decision in the *Everson* case.

⁹ *Cochran v. Board of Educ.*, 281 U.S. 370 (1930).

¹⁰ *Everson v. United States*, *supra* note 7.

¹¹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

The court in the principal case found that the religious affairs of the Catholic church could not be separated from its educational instruction and, as a result, concluded that tuition payments were financing the teaching of the Catholic religion. The payment of tuition directly to parochial schools in the principal case is distinguishable from the forms of aid held constitutional by the Supreme Court in two respects. First, tuition payments may be used by the school for any purpose, while the money expended by the state for books and transportation was earmarked for particular purposes which the Court found to be non-religious. Second, the tuition payments in the principal case were made directly to the school, while the payment for bus transportation was a reimbursement to the parent. Thus the payment of tuition by the state differs from forms of state assistance found to be constitutional both in the type of aid and in the method of payment.

The President's program of federal grants to parochial colleges and universities¹² is based on the assumption that the constitutionality of any program depends on the type of aid rendered by the state. The President has expressed the opinion that grants to sectarian colleges are constitutional because these grants are expressly limited in scope, while direct grants to parochial elementary and secondary schools would be unconstitutional if unlimited in scope.¹³ This argument assumes that grants which are made for particular purposes will not support the teaching of religion, while those made without limitation may in part finance religious education. Regardless of the type of the grant, all state grants to parochial schools or colleges will aid the teaching of religion. If the expenses were not paid by the state grant, the parochial school or the parent supporting the parochial school would pay these expenses out of other funds. This means that any specific state or federal grant frees funds for the parochial school to use as it would use the funds from a grant without limitation.

In the principal case the school district implemented the Vermont statute by making tuition payments directly to the schools where the students were in attendance. The statute would seem to permit school districts to exercise a wide discretion in the selection of means to implement the statutory objective.¹⁴ In fact, the court in the principal case suggests that payment of tuition might have been made to the parents as a discharge of the state's duty to provide educational facilities.¹⁵ If the payment of tuition to parents were held constitutional, the assumption behind such a

¹² This program is one of grants to state, private and parochial colleges and universities for the construction of dormitories and academic facilities.

¹³ N.Y. Times, March 12, 1961, § 4, p. 2, col. 1.

¹⁴ VA. STAT. ANN. tit. 16, § 793 (b) (1958): "Each town district shall pay tuition per pupil per school year as billed, but not in excess of \$325 unless authorized by a vote of the town school district, but in no case shall the tuition exceed the cost per pupil per year for the maintenance of such school for the previous year."

¹⁵ Principal case at 515-16.

decision would be that the constitutionality of a state grant would depend on the method in which payment was made. The New York program for aid to higher education¹⁶ is based upon an assumption that payments to the pupils or their parents are constitutional. The New York program also contains a "need" requirement which, according to the New York Attorney General, is necessary for the constitutionality of the plan in order to demonstrate that the parents and not the parochial schools are the recipients of the state funds.¹⁷ Since the Supreme Court has recognized the rights of parents to control the education of their children,¹⁸ it might be argued that there is a basis for distinguishing between grants to parents and grants to parochial schools. But regardless of how grants are paid, the ultimate recipient will be the school or college in which the parent enrolls his child. The substantive effect of a program such as the New York program of the federal scholarship plan is the same as if direct grants were paid to parochial schools for the tuition of their students.

The current proposals to aid parochial schools have not been satisfactorily distinguished from direct grants of money given in the principal case. Neither the type of aid given by the state or federal grant nor the method of its payment create substantive differences in result. Yet aid given for a particular purpose to the parents of parochial school children has been held constitutional.¹⁹ It remains for the United States Supreme Court to establish more meaningful standards to determine what aid to sectarian schools constitutes an "establishment of religion."

William S. Bach

¹⁶ The New York program calls for grants of up to \$150 per semester to students paying over \$100 in tuition. N.Y. Sess. Laws 1961, ch. 389, § 601-a.

¹⁷ N.Y. Times, Feb. 15, 1961, § 1, p. 31, col. 5.

¹⁸ Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

¹⁹ Cochran v. Board of Educ., *supra* note 9; Everson v. United States, *supra* note 7.