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CONSTITUTIONAL LAW-DUE PROCESS -OF LAW-FREEDOM OF RELIGION- VOLUNTARY RELIGIOUS CLASSES HELD IN PUBLIC SCHOOL BUILDING DURING SCHOOL HOURS

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FREEDOM OF RELIGION—VOLUNTARY RELIGIOUS CLASSES HELD IN PUBLIC SCHOOL BUILDING DURING SCHOOL HOURS—Appellant, a resident and taxpayer of the Champaign School District and parent of a child attending the public schools of the district, petitioned for a writ of mandamus to compel the district to discontinue religious classes held in the public schools during regular school hours. The classes in question were sponsored by a voluntary association of Jewish, Catholic, and Protestant faiths, but other religious groups were free to establish classes upon the same basis. Instructional materials, a chosen course of study, and religious teachers were made available to the program by the association. Although employed by the association, the teachers were under the supervision of the Superintendent of Schools. Children were excused from regular classes to attend, and admission was allowed only upon written request of parents. Classes were in session not more than forty-five minutes per week. Non-participating pupils continued with regular school work, and separate rooms were utilized by the various sects represented. Both the trial court and the Supreme Court of Illinois [1] denied the petition on the ground that no Illinois or federal constitutional right had been violated. On appeal to the United States Supreme Court, *held*, reversed. The program violated the "establishment of religion" clause of the First Amendment and hence was a denial of due process of law under the Fourteenth Amendment. *People of Illinois ex rel. McCollum v. Board of Education*, (U.S. 1948) 68 S.Ct. 461.

The First Amendment to the United States Constitution, made applicable to state action by the Fourteenth,[2] imposes two restraints on federal and state action: No law can be made "respecting an establishment of religion," and none can be made "prohibiting the free exercise thereof." The second restraint has been construed many times,[3] but the first has until recently been the subject of comparatively few controversies before the Supreme Court.[4] In *Everson v.*

[1] 396 Ill. 14, 71 N.E. (2d) 161 (1947).

[2] Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940); Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947).

[3] See discussion and cases cited in comment, 45 MICH. L. REV. 1001 (1947).

[11] For an excellent exposition of the weakness of excessive reliance on historical tests in religious freedom cases, see Summers, "The Sources and Limits of Religious cation, 330 U.S. 1, 67 S.Ct. 504 (1947).

Board of Education, a broad constitutional principle based upon the first restraint was asserted by the Court, but the particular facts under consideration were held not to be a violation thereof.[5] Thus, the principal case assumes importance as the first Supreme Court decision to invalidate governmental action, either state or federal, as an "establishment of religion." [6] The prevalence on a national scale of programs similar in some respects to the Champaign plan [7] necessarily gives rise to speculation as to the result of scrutiny of such other plans by this Court.[8] Two elements were emphasized by the majority as the basis for reversal: (1) Use of the state's tax-supported public school buildings for the dissemination of religious doctrines, and (2) Invaluable aid to sectarian groups by providing pupils for religious classes through the use of the state's compulsory public school machinery. Whether or not either element existing without the other would be sufficient to invalidate a similar program is a question vital to the public interest.[9] The solution to the problem [10] inevitably depends upon a weighing of the social advantages of such a program against the seriousness of any resulting threat to the freedom constitutionally protected.[11] There would

[5] Ibid. The decision sustained as constitutional a state statute authorizing reimbursements from tax-created funds to parents for transportation of pupils to and from public and private non-profit schools. For surveys of the implications of this case, see: 45 MICH. L. REV. 1001 (1947); 60 HARV. L. REV. 793 (1947); and 33 VA. L. REV. 349 (1947).

[6] For decisions of state courts as to the constitutionality of "released time" plans providing for religious instruction outside the school building, see: People ex rel. Latimer v. Bd. of Education, 394 Ill. 228, 68 N.E. (2d) 305 (1946); New York ex rel. Lewis v. Graves, 245 N.Y. 195, 156 N.E. 663 (1927); and Gordon v. Bd. of Education, 78 Cal. App. (2d) 464, 178 P. (2d) 488 (1947). See generally 141 A.L.R. 1144 (1942), and 167 A.L.R. 1473 (1947).

[7] See concurring opinion of Mr. Justice Frankfurter in the principal case for an excellent discussion of the history and scope of "released time" programs generally. (U.S. 1948) 68 S.Ct. 461 at 466.

[8] For a hint of possible procedural difficulties in future cases, arising out of insufficient interest on the part of the complainant, see concurring opinion of Justice Jackson, (U.S. 1948) 68 S.Ct. 461 at 475.

[9] Analysis of the reversing opinions led Justice Reed to make this observation: "From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban." Dissenting opinion, (U.S. 1948) 68 S.Ct. 461 at 479.

[10] The specific problem of the principal case suggests another type of controversy that would embroil the Court in substantially greater difficulties. It is not inconceivable that tax-payers of a particular religious sect might reasonably consider certain aspects of the regular course of study of a public school to be religious training thinly disguised. Justice Jackson points out in his concurring opinion the practical difficulties of furnishing children with an adequate secular education without some allusion to religion and its effect on history and culture. What constitutes religious education might well be the crucial issue of a future case. See opinion of Jackson, J., (U.S. 1948) 68 S.Ct. 461 at 475.

[11] For an excellent exposition of the weakness of excessive reliance on historical tests in religious freedom cases, see Summers, "The Sources and Limits of Religious Freedom," 41 ILL. L. REV. 53 at 55 (1946).

seem to be little objection from a constitutional standpoint to a program involving absolute dismissal of all pupils during a certain period each week, during which time religious groups could provide voluntary training outside the school building,[12] and it would seem at least doubtful whether any policy requires exclusion of all forms of cooperation between school and church.

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[12] See concurring opinion of Mr. Justice Frankfurter for a description of the French "dismissed time" programs, (U.S. 1948) 68 S.Ct. 461 at 471.