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Constitutional Law - Results of the "Everson Amendment" - the McCollum Case

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CONSTITUTIONAL LAW—RESULT OF THE "EVERSON AMENDMENT"—THE McCOLLUM CASE

On February 10, 1947, the United States Supreme Court decided in the *Everson* case by a 5-4 vote that a New Jersey statute authorizing recompense to parents of money expended for bus transportation of their children to and from schools other than those operated for profit did not, insofar as it permits payment of transportation of children attending Catholic parochial schools, violate the First Amendment. The Court held that the statute merely provided a general program to help parents get their children, regardless of religion, safely and expediously to and from accredited schools.[1] In arriving at this decision, the "establishment of religion" clause in the First Amendment was construed; the Court stating: "The 'establishment of religion' clause 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."[2] (Italics mine)

In the *McCollum* case which followed the *Everson* case, one Mrs. McCollum had petitioned the Illinois State Court that the Board of Education of Champaign County, Illinois be ordered "to adopt and enforce rules and regulations prohibiting all instruction in and teaching of *all religious education* in all public schools in Champaign District 71 and in all public school houses and buildings in the district when occupied by public schools." (Italics mine) She claimed interest as a resident and taxpayer of Champaign and as a parent whose child was enrolled in the public schools.

It appeared in that case that in 1940 members of the Roman Catholic, Protestant, and Jewish faiths formed a voluntary association called the Champaign Council on Religious Education. With permission of the Board of Education they offered classes in religious instructions to public school pupils, they being "released" from secular instruction during the periods of religious instructions. Classes were held weekly, thirty minutes for the lower grades and forty-five minutes for the higher grades. Parents were required to sign cards, prepared at the expense of the Council and given to pupils by the secular teachers, requesting their children be permitted to attend. The religious instructors were paid by the Council, but were subject to the approval and supervision of the superintendent of schools. Religious instructions were given separately in classrooms in the school. Students who did not attend these religious classes were required to continue their secular studies. Students released for religious instructions were required to be present at these classes, and reports of their presence or absence

[1] Everson v. Board of Education of the Township of Ewing, et al., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).
[2] Supra, note 1, 330 U.S. 1, 15.

were made to their secular teachers. Plaintiff's son was an atheist and she claimed her son was embarrased in this school when he didn't attend any religious classes.

The Supreme Court of Illinois denied her relief stating the program violated neither the State nor Federal Constitution,[3] and an appeal was taken to the Supreme Court of the United States.

That Court by an 8-1 decision reversed the Illinois Supreme Court and held the program unconstitutional as against the First and Fourteenth Amendment.[4] Justice Black, in writing the majority opinion stated: "The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. . . This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread the faiths."[5] Justice Black relied on the interpretation of the First Amendment in the *Everson* case as above quoted. He refused without comment to accept the argument presented as to the historical interpretation of the First Amendment, that it was merely intended to forbid only government preference of one religion over another.

Justice Frankfurter's concurring opinion is an interesting discourse on that part of the history of education which confirms *his* ideas of the "constitutional principle of absolute separation." He also stated that other forms of "released-time" programs might not be found objectionable.

Justice Jackson, concurring, doubted the jurisdiction of the Court and stated that: "what she (Mrs. McCollum) has asked of the courts is that they not only end the 'released-time' plan but also ban every form of teaching which suggests or recognizes there is a God. . . If we are to eliminate everything that is objectionable to these warring sects (256 separate religious bodies existing in the United States), we will leave public education in shreds. This Court does not tell the State Court where it may stop, nor does it set up any standards by which the State Court may determine that question for itself." It is difficult to see how, recognizing these apparent dangers in the decision, Justice Jackson could notwithstanding concur in the decision of the Court.

Justice Reed lone dissented stating, "I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. I can only deduce that religious instruction of

[3] People ex rel. McCollum v. Board of Education of School District, 396 Ill. 14, 71 N.E. (2d) 161 (1947).
[4] People of State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, 68 S.Ct. 461 (1948).
[5] Supra, note 4, 68 S.Ct. 461, 464.

public school children during school hours is prohibited. The history of American education is against such an interpretation of the First Amendment."

THE "EVERSON AMENDMENT"

The First Amendment in part reads: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . ."

This Amendment by interpretation of the Supreme Court now means: "Neither a state nor Federal Government can pass laws which aid one religion, *aid all religions,* or prefer one religion over another." This unfounded interpretation destroys the basic principle of the First Amendment, and implants the Godless principle of complete separation. It is, in effect, an amendment to the Constitution which justifies the characterization of the case making that interpretation the "Everson Amendment."

The Court, in applying this Court-made Amendment, states that it means the complete separation of Church and State. The prohibition on the Federal Government is made applicable to the States through the Fourteenth Amendment. Although the freedom of religion clause was made applicable to the States by this means in the *Cantwell* case,[6] it was not until the *Everson* case that the establishment of religion clause was made so applicable.

The Court, in arriving at their interpretation of the First Amendment, relied on the legislative history of our country. The Court relies most heavily on Madison's *Memorial* and *Remonstrance* and his fight for the Virginia Bill of Rights along with that of Jefferson's. Their restatement of history is undoubtedly correct, as far as it goes. And following this line of history, their interpretation of the First Amendment is not only logical, but correct. If we had no other recourse to history but that which the Court has relied on, there would be no dissenting from their conclusion.

However, with all due respect to our Court, if one attempts to probe a bit deeper into our historical resources, it will result in a quite different interpretation of the First Amendment, which the writer earnestly believes is the interpretation given it by the Framers of the First Amendment and the States ratifying it.

It would be needless repetition to reiterate the historical findings of the Court. They are well laid out in both the majority and minority decisions of the *Everson* case.

The writer believes that Madison's *private* views, set forth in his Memorial and Remonstrance, and accepted by the Court in its interpretation of the First Amendment, were not his *public* views in the

[6] Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

House of Representatives when the First Amendment was presented by resolution of Congress to the States for adoption.

Justice Black states the conclusion of Virginia's interpretation thus: "The people there (in Virginia), as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, support, or otherwise to *assist any or all religions,* or to interfere with the religious beliefs of any religious individual or group."[7] (Italics mine)

Virginia however, proposed the following Amendment to Congress as part of the Bill of Rights: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that *no particular religious sect or society ought to be favored or established, by law, in preference to others.*"[8] (Italics mine)

The writer fails to see where this declaration evinces an intent not to assist any or all religions, as stated by Justice Black. The clear meaning is not a prohibition against aid or assistance to all religions, but rather an assistance to one to the exclusion of others. James Madison went to Congress pledged to support this proposal of his state.

The following report on the history of the First Congress is given to enable the reader properly to understand the development of the First Amendment and the interpretation given and understood by the Framers of this Amendment, who represented the individual States of the Union at that time.

The first version of the First Amendment read: "The civil rights of none shall be abridged on account of religious belief, *nor shall any national religion be established,* nor shall the full and equal rights of conscience in any manner or on any pretext be infringed."[9] (Italics mine) This was referred to a committee, of which Madison was a member and the second version reported read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[10] Rev. Wilfred Parsons, S.J. comments on this version and states: "It is also the second reference in Congress to *establishing* religion. But the introduction of the word is significant. It showed what the Congress held paramount; namely, that the Federal Government as such should adopt no religion as the national religion. . ."[11]

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[7] Supra, note 1, 91 L.Ed. 711, 721.
[8] The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Jonathan Elliott (1836), Vol. III, p. 659.
[9] Annals of Congress (1789), Vol. I, p. 434.
[10] Supra, note 9, Annals I, p. 729.
[11] Rev. Wilfred Parsons, S.J., The First Freedom (New York: Declan McMullen, 1948), p. 32.

The following debate, highly informative on the intention of the Framer's is reported in the Annals of Congress:[12] Mr. Gerry thought it should read; "No religious doctrine shall be established by law." Mr. Madison said he apprehended the words to be, that Congress shall not establish a religion, and enforce the legal observance of it by law, nor compel men to worship God in any manner contrary to their conscience. He presumed *the amendment was intended to prevent Congress from establishing a national religion.* Mr. Huntington agreed with Madison on the interpretation, but he said: "Others might find it convenient to put another construction on it." Mr. Madison thought if the word "national" was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared *one sect* might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. Mr. Livermore then proposed: "Congress shall make no laws touching religion", which although accepted, was not accepted by a necessary two-thirds vote. The interpretation of the present Court appears to be in accord with this proposal. However, this version died in Committee and was never brought up again.

The fourth version of the Amendment was altered so to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." This was passed by the House and went to the Senate. This version rejected Mr. Livermore's proposal and was in accord with the second version.

The Senate version read: "Congress shall make no laws establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . ."[13] Reverend Parsons commenting on this version states: "It did nothing to the House version but indicate the Senate's desire that the amendment contain nothing antagonistic to religion and to make clear that Congress should not establish a national religion and enforce observance of it by law."[14] Reverend Burke states: "This language quite clearly shows that the Senates purpose was to outlaw an exclusive religious establishment."[15]

The last version and the present First Amendment: "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof. . ." Reverend Burke summarizes as follows:

> "The joint conference committee of the First Congress compromised not ideas but phraseology; its product is the current form of Amendment One. This history, all groups of the Su-

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[12] Supra, note 9, Annals I, p. 730-731.
[13] Supra, note 9, Annals I, p. 71 and 77.
[14] Supra, note 11, p. 39.
[15] An article entitled: "Busses, Released Time and the Political Process," Rev. James L. Burke, S.J., for private circulation.

preme Court notwithstanding, shows that what was banned was not the aiding of religions, but the imposing of one religious faith or worship on the people to the exclusion of others."[16]

Reverend Parsons reaches the following conclusions:

"(1) The thought of Congress, after debating and changing Madison's first version of the Amendment, crystallized around two basic ideas; the national government should adopt no religion as the official one of the United States, and it should respect the freedom of the exercise of any religion.

(2) Nothing was done about what the individual States might do in this regard and it was understood that each State retained the right of establishing the religion of its choice, or of supporting any or all religions, as many of them did for many years thereafter.

(3) Nothing was said or implied in the legislative process to the effect that the religious amendment to the Constitution forbade the Federal Government to maintain relations with various forms of religion, or even to support them, provided it acted with equality and impartiality.

(4) The so-called "American principle of separation of church and state" simply did not exist at the time of the adoption of the First Amendment, while the policy of co-operation of the state with religion was universal.

(5) The ruling motive behind the adoption of the First Amendment was partly political — the Constitution would not have been ratified unless it was understood that the Federal Government would not interfere with local arrangements about religion; and partly legal — the national state that was being set up (whatever the individual States might do) was granted no competence of deciding in matters of religion as such.

(6) The final solution arrived at by the Congress was that the Federal Government should respect equality among competing religious denominations, and also the right of each individual, as far as the Federal Government was concerned, to belong to the denomination of his choice."[17]

The writer deems it unnecessary to delve into the meaning of Jefferson's figurative wall of separation between church and state. Justice Reed, dissenting in the *McCollum* case, effectively smashed this argument by pointing out that Jefferson was arguing for the inclusion of religious sects within his own University of Virginia.[18] Obviously Mr. Jefferson did not mean what the Court has interpreted his statement to mean. Justice Reed went on to say, "A rule of law should not be drawn from a figure of speech."

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[16] Supra, note 15.
[17] Supra, note 11, p. 48-49.
[18] Supra, note 4, 68 S.Ct. 461, 482 and footnotes.

CONCLUSION

On the basis of the foregoing historical facts, and numerous others, it appears that the First Amendment must be interpreted to mean that Congress shall not set up, ordain, favor, prefer, aid, or any other synonymous term, *one* religion to the *exclusion* of all or any others. There was no attempt or intent to forbid aiding all religions. This is also made clear when it is considered how religion was treated and accepted under this amendment in the past.

Congress has opened their session with a prayer by a chaplain for one hundred and fifty nine years. The same men who voted for these chaplains framed and accepted the First Amendment. Is this consistent with the principle of complete separation now read into the amendment?

The military forces of this country likewise have chaplains, of all religions. The Army and Naval Academy make church attendance compulsory. Again we may ask, complete separation?

Church property is and has been tax-free. Surely this is an aid to religion in any sense of the word.

Veterans of the last war are receiving education at colleges and universities controlled by different religious societies. The Federal Government is paying these schools directly for this education. A note in one of the law reviews attempts to brush the question aside by stating there is a difference between elementary schools and institutions of higher learning and that it may be justified as a war measure of limited duration.[19] The principle of religious education in a non-sectarian school is the same in elementary schools as in an institution of higher learning. If the First Amendment forbids one, it must of necessity forbid the other, and the fact that it is a war measure of limited duration does not absolve the unconstitutionality of the program. The United States Supreme Court stated in the famous *Milligan* case: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented, by the wit of man than that, any of its provisions can be suspended during any of the great exigencies of government."[20] The simple answer appears to be that these accepted governmental attitudes in the treatment of religion do not violate the First Amendment, as the First Amendment never forbade the aiding of all religions. On the basis of the "Everson Amendment", however, all the foregoing instances showing co-operation between church and state, to which many more might be added, could logically be declared unconstitutional.

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[19] 60 Harvard Law Review 793, 798, footnote 57 (1947).
[20] Ex Parte Milligan, 4 Wall. 2-142, 120-121, 18 L.Ed. 281, 295 (1866).

The *McCollum* decision is a logical result of the application of the "Everson Amendment". Take away the "Everson Amendment", reinstate the First Amendment, and the *McCollum* decision is clearly wrong. This case has raised a roar of protest throughout the country by people who believe, as our Founding Fathers did, in freedom *of* religion, and not freedom *from* religion. The decision will also raise a staggering amount of litigation, as Justice Jackson appears to fear. The entire issue is now more unsettled than before. This is unfortunate. However, notwithstanding the uncertainty engendered by its implications, it must be remembered that the decision in the *McCollum* case must be strictly applied to the facts in that case. All that can safely be predicted is that, if a "released-time" program is identical with the Champaign program, it is unconstitutional. It does not follow that all such programs offend the Constitution. In some programs, children are taught religion during school time but off public school premises. There is no indication in the *McCollum* case that this is unconstitutional.

The floating principle of the "Everson Amendment", standing without foundation, cannot legally or logically withstand the heavy strains of litigation which most surely will arise. How far this principle can be extended before it falls is unknown. Is it absurd to say that as state compulsory education laws allow a child to attend an accredited parochial school instead of a public school, the state by recognizing this school is thereby aiding it and religion in the Constitutional sense? Is it absurd to say that state agencies, such as police and fire departments should not protect religious property? Is it absurd to say the Government must not use "In God We Trust" on our coins? If it appears absurd, let us hope it remains absurd. Serious minded men of all stations and religions have asked these and other similar questions in many editorials and speeches that can be found printed in the Appendix of the Congressional Record for March and April of this year. Let us hope that this question will be given further consideration in the future. America cannot be declared a Godless State. The close co-operation of religion with all our activities, governmental and otherwise, is too well established to now be destroyed unless we further amend our Constitution so as to provide *against* all such co-operation with religion.

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