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Article 9

Constitutional Law: The Fourteenth Amendment and the part time religious day schools

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NOTES AND COMMENT

Constitutional Law: The Fourteenth Amendment and the part time religious day schools.—In order to understand the application of the fourteenth amendment to the extensive and intensive movement to bring religious culture back to the children in our public schools, two recent decisions of the United States Supreme Court must be read together.

The hysteria bred by the World War produced in many states repressive legislation forbidding in private schools the use of any foreign language, or specifically the German language, either as a means of instructing children under the eighth grade, or as a subject of instruction. The question of the constitutionality of these statutes arose in three states in connection with Lutheran parochial schools and was carried to the United States Supreme Court. The Iowa case was argued October 10, 1922, while Oregon was in the throes of a political fight involving the adoption by popular vote of a compulsory education act which attempted with one blow to wipe out all private primary schools. The Ohio case was argued November 28, 1922, after Oregon had on November 7, adopted its Compulsory Act. The Nebraska case (or rather cases) was argued February 23, 1923. There is no reason to doubt that the members of the Supreme Court had the same information which the rest of the country obtained concerning the Oregon development. The court held all the cases until June 4, and then decided them holding that the Iowa, Ohio, and Nebraska statutes violated the fourteenth amendment. Probably with a view to the Oregon situation the court took occasion to say:

> For the welfare of his ideal commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . . The proper officer will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious unknown place as they should be." In order to submerge the individual and develop ideal citizens Sparta assembled the males at seven years of age into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.[1]

Whether this language was intended as an invitation to bring the Oregon law before the court for destruction is a question with which we need not concern ourselves. The question of the constitutionality of this law was speedily raised and the issue was submitted to the court on March 16, 1925. The court considered the question for less than

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[1] *Meyer v. Nebraska*, 262 U.S. 390, 401, 402.

two and a half months and on June 1, 1925, held the law to be unconstitutional, using the following significant language:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[2]

This language is not limited in terms to such parents as choose to send their children to some parochial school. It may well apply to all parents in the land even those who send their children to a public school. By its decision the court has definitely checked the pretensions for a monopoly which the public school system was making so far as it sought by legislative means to wipe out competing parochial schools. It has drawn the line vertically between public and private schools. Is it too much to hope that it will follow out this decision if given an opportunity, by drawing the line horizontally in connection with schools which seek to co-operate rather than compete with the public school system? Is it not entirely reasonable to expect that it will hold that a state cannot by a compulsory education law exclude its public school children from part time religious day schools? The purpose of compulsory education acts is to obtain for the children of the country the fullest amount of a well-rounded education. That also in the fullest measure is the purpose of the religious day schools. Both systems of schools, each within its own particular sphere of action, aims to accomplish the same purpose. The religious schools merely aim to take over that part of the education of the child which the public school system cannot perform in this country. To limit a child to the public schools is to limit its education—a purpose inherently at war with the underlying policy of compulsory education acts. Certainly, a favorable decision by the supreme court would be a charter of liberty, a veritable Magna Charta for the day school movement. It would clear away every legal obstacle which under state constitutions and state decisions now obstructs its progress. It would make entirely unnecessary any tinkering with state constitutions and statutes. Even an unfavorable decision would clear the atmosphere and show the necessity for vigorous local action. In view of the tremendous advantage that would result from a favorable decision in view of the less advantage that would result from even an unfavorable decision, a speedy appeal to the United States Supreme Court of a case or cases properly shaped to embody the essential features would seem in order.

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Constitutional Law: Tax on corporations held "privilege" or "excise" and not property tax, and not to interfere with interstate or foreign commerce or to deny equal protection of laws.—The subject of taxation presents to our present day courts many vital questions involving the constitutional rights of individuals and corporations. Our supreme courts are called upon at every term to pass upon the validity of legislation increasing the burden imposed by the government upon

[2] *Pierce v. Society of the Holy Name,* 17 L.Ed. 688.