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Church and State - Religion and Politically Organized Society

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At the present time in the United States, the doctrine of separation of Church and State is emphasized to the extent that, paradoxically, man is more and more assured his religious freedom. The Supreme Court of the United States has leaned so far toward the preservation of public properties, such as public school buildings, public assembly halls, and the like, from sectarian use for religious purposes, that it reaffirms, in a rather circuitous manner, the freedom of man to worship as he pleases on his own private properties.

The two leading cases on the subject of separation of Church and State are People ex rel McCollum v. Board of Education of School District No. 71 and Everson v. Board of Education. In the McCollum case, it was determined that a "released time" program whereby pupils were released, upon parental request, to attend religion classes held in public school buildings for a certain prescribed period each week, was in violation of the First Amendment. The Everson case held that the state use of tax monies to transport children to a parochial school was a valid public purpose, even though the schools were incidentally benefitted thereby. The dictum in that case however moulded the First Amendment into a firm interdiction: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." 4

In view of these holdings, the Supreme Court of New Jersey has recently handed down a somewhat surprising decision. In the case of Doremus et al. v. Board of Education a statute was involved which provided that at least five verses from the Old Testament be read without comment, and that the Lord's Prayer be recited, every school day, in the public schools. In an unanimous decision, the Supreme Court of New Jersey held that such readings and recitations were not in violation of the First and Fourteenth Amendments of the United States Constitution. How to reconcile this apparent inconsistency!

Historically, the background of the "religious liberty" of American Constitutional philosophy is found in the seventeenth century struggle for toleration which brought immigrant ancestors to the western world. The Roman Catholic Province of Maryland, in 1649, approved the early American colonial expression of that toleration, proclaiming that the laws of the province should apply to all men equally, regardless of their religious affiliations. "The Toleration Act" was placed on the statute books. It was the first statute

5. 75 A.2d 880 (N.J. 1950).
6. U.S. Const. Amend. XIV.
7. 1 Archives of Maryland 95 (Browne 1883).
8. 1 Archives of Maryland 244 (Browne 1883).

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which issued from an American legislative assembly granting religious
tolerance.

In the meantime, Roger Williams, who had founded Providence, R.I. in
1636 and therein taught immunity of religion from civil restraint, published,
in 1644, a separatist tract, “The Bloody Tenent of Persecution”, which pro-
claimed that there should be a separation of the church from the state, to
the extent that all spiritual matters and acts would be solely within the juris-
diction of the church, and that all civil matters and acts would be entirely
within the province of the state, neither transgressing the bounds of the other.
It was not until 1663 that Charles II granted to Williams the charter of Rhode
Island allowing a full freedom in religious matters. The charter contemplated
the coexistence of civil and ecclesiastical autonomy, and recognized a moral
culture under which the individual was considered capable of controlling his
own destiny.

Another treatise which exercised an influence on the conversion of tolera-
tion into liberty, appeared, near the end of the seventeenth century, in Europe.
In his cry for disestablishment, John Locke, in “A Letter Concerning Tolera-
tion”, written in 1689, declared that the bounds separating church from state
should be so fixed that the business of the civil government might be distin-
guished from that of the ecclesiastics.

While the feeling for the necessity of religious tolerance was growing in
most of the early colonies, it was by no means unanimous. In Virginia,
statutory enactments actively suppressed religious tolerance. The Virginia
Colonial Assembly typified the colonial reaction of some of her neighbors,
by successively expelling all Catholic priests, 9 dealing harshly with the
Quakers, 10 and persecuting the Baptists. 11 This resulted in the fall of the
Church of England in Virginia. 12

After this collapse of the “state-church” in Virginia, the legislators there,
feeling the need for some sort of religion in the State, introduced, in 1784, a
“Bill establishing a provision for teachers of the Christian religion.” This
bill gave rise to Madison’s “Memorial and Remonstrance”, 13 in which
Madison indicated his opposition to state recognition of religion. He believed
that such religion violated equality in that it required men to support that to
which they might not have assented. Jefferson effectuated Madison’s policies,
when he introduced to the Virginia Assembly his “Act Establishing Religious
Freedom.” 14

Madison and Jefferson were two of the foremost members of the Con-
stitutional Convention in 1787. It was only natural that their opinions re-
garding the separation of church and state would be seriously considered
by the framers of the Constitution. Through their influence, and that of
others, the Convention adopted, unanimously, the provision that “No religious
test shall ever be required as a qualification to any office or public trust
under the United States.” 15 Ratification was not achieved, however, until
an amendment through a Bill of Rights provided an unqualified guaranty of
religious freedom. 16 This forced the adoption of the First Amendment,

9. 1 Laws of Virginia 269 (Hening 1823).
10. 2 Story, Commentaries on the Constitution sec. 1878 (1891).
13. 2 Howison, History of Virginia 297 (1848).
14. 1 Laws of Virginia 84 (Hening 1823).
15. U.S. Const. Art. VI, cl. 3.
which provided, among other things, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Thus, it was by public demand that the concept of religious tolerance became converted into the principle of religious freedom. This transition, while brought about by public demand, was carried out by the framers of the Constitution, who adopted the concept that such a transition was only to be achieved by prohibiting governmental establishment of religion, indirectly guaranteeing religious freedom to all. Since the Constitution is a civil instrument, this concept of freedom is based on political conviction rather than religious principle. The questions involving the scope of constitutional provisions for religious freedom are found in the decisions of the Supreme Court of the United States.

The case of Mormon Church v. United States 17 is authority for the proposition that the First Amendment will not support religious practices contrary to civilized morality. There the practice of polygamy was held to be outside the protection of the Constitution. In the case of Church of the Holy Trinity v. United States, 18 there was an act of Congress involved, which made it a misdemeanor to import aliens to perform "labor or services of any kind." It was held that it could not have been the intention of Congress to exclude from this country a foreign minister called to an American pulpit, and that to hold otherwise would be to attribute to Congress an irreligious motive. In another case, Vidal v. Girard's Executors, 19 the Supreme Court sustained the will of the testator, which provided that a college should be established in Pennsylvania, but that no ministers should be permitted to enter the school. At the same time, however, the Court said: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania.'

The appropriation by Congress of funds for a hospital located in the District of Columbia, which was to be conducted by Roman Catholic nuns, was held by the Supreme Court not to violate the provisions of the First Amendment. 20 But, the Court in the case of Coleman v. Griffin 21 gave its indirect sanction to the decision of a Tennessee court in Scopes v. State 22 in holding that the distribution of religious tracts without a license in violation of an ordinance is not protected by the constitutional guaranty of freedom of religion, although holding, in a later case, Lovell v. Griffin, 23 that the guaranty of freedom of press in the same constitutional provision rendered the same ordinance invalid.

The United States Supreme Court shows, therefore, that in order for the American people to attain the goal of life, liberty, and the pursuit of happiness, there must be a separation of church and state, but not such a separation as would leave the state devoid of faith in God. The American people are basically theistic, and believe that faith in God is a necessary prerequisite to the complete attainment of this goal. This theistic concept is neither acknowledged nor denied by the First and Fourteenth Amendments to the Constitution, but neither can it be said that the framers of the Constitution did

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17. 136 U.S. 1 (1890).
18. 143 U.S. 457 (1892).
19. 2 How. 127, 198 (U.S. 1844).
22. 154 Tenn. 105, 289 S.W. 363 (1927).
23. 303 U.S. 444 (1938).
not act upon this concept in their endeavor to establish a true democracy.

It can be readily seen that the intent behind the First Amendment was to separate the two sovereignties of church and state -- to "Give to Caesar the things that are Caesar's, and to God the things that are God's" so to speak. From the holdings of the Supreme Court of the United States, however, it is reasonable to assume that a separation of church and state is not a separation of religion and politically organized society. While the bounds of the church and state have been established as being mutually exclusive of one another partially, the same is not true of the bounds of religion and society. The promotion of religion is the object of the church, but it is not the church itself.

The McCollum and Everson cases, supra, often cited as prohibitions against "religious" practices in public schools, deny to any sectarian group preferences and privileges which could result in placing other sectarian groups at a disadvantage. It is not a restriction imposed upon religion as such, but is really a restriction upon the sovereignty of the church. In other words, the implications of these two cases may not be as onerous as might appear.

If the New Jersey Supreme Court had held the practice of reading from the Old Testament, and reciting the Lord's Prayer, to be in violation of the First and Fourteenth Amendments, it would have been adhering to the principle of separation, not only of church and state, but also of religion and politically organized society. Such reading and recitation are not designed to inculcate any particular dogma, creed, belief or mode or worship, and cannot, therefore, be said to be sectarian in any degree. There is no question of an invasion of the province of the state by one particular church or group of churches. It may perhaps be distinguishable, therefore, from the McCollum and Everson cases. Where they may hold for a separation of religion and politically organized society, it may be fairly well said that the Doremus case does not.

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