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Church, the State, and Mrs. McCollum

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THE CHURCH, THE STATE AND MRS. McCOLLUM

The first Amendment to the Constitution of the United States provides that:

> *Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

On March 8, 1948 the Supreme Court of the United States[1] decided in substance that this language prohibits the tax-supported city school systems of the State of Illinois from assisting and encouraging general religious instruction. Just how a constitutional restriction against specified *congressional* action can possibly impede the activity of a local Illinois school board is an inglorious mystery of modern constitutional construction.

The decision has raised an uproar of protest from lawyers and laymen in all parts of the country. It undoubtedly disturbed the equanimity of the Supreme Court itself. Only four of the Justices were completely satisfied with Justice Black's official judgment.[2] Four others [3] joined in a separate concurring opinion and one of these four [4] added his own particular reservations in the form of a third opinion. Mr. Justice Reed dissented. In one way or another however, and for one reason or many, the Court decided eight to one that when the First Amendment says "Congress" it means, among other things, a local school board and when it says "an establishment of Religion", it outlaws the approval by such board of any activity during school hours which is calculated to promote the interest of public school children in the existence and power of God.

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1 People of the State of Illinois *ex rel* Vashti McCollum, Appellant v. Board of Education of School District No. 71 etc. ....U. S....., 69 S. Ct. 461 (1948).

2 Justices Black, Vinson, Murphy and Douglas.

3 Justices Frankfurter, Jackson, Rutledge and Burton.

4 Justice Jackson.

If, as one glib commentator has perspicaciously said[5] the Supreme Court in this case had merely "upheld the Constitutional right of Jimmie McCollum, age 12, to go to hell", the decision would have sounded no general alarm. But the conclusions of the court are definitely revolutionary in at least two important respects.

The first and most important of these conclusions is the judicial determination that religion and American government have nothing in common and that both must henceforth operate in unrelated spheres behind an impregnable wall of separation.

The second conclusion solemnizes the unfortunate miscegenetic marriage of the First and Fourteenth Amendments, a union, which for some unstated reason the present Supreme Court has sought to effect throughout the past seven years. In the legal and logical order the second conclusion precedes the first. A prior examination of its premises should consequently turn up clues to the Court's tortuous but nevertheless certain determination that God must get out of the American Public School.

The first ten amendments to the Constiution of the United States are popularly known as the Federal Bill of Rights. The scope and purpose of those Amendments was settled by the Supreme Court of the United States in 1833.[6] Speaking for the Court, Chief Justice Marshall then declared that the provisions of this so-called Bill of Rights restricts only the Federal government and that its provisions were not intended, and could not be construed to apply to the state governments.[7]

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5 Milton Mayer, *Come All Ye Faithless,* The Progressive, April 1948.

6 Barron v. Mayor etc. of Baltimore, 32 U.S. 243, 8 L. Ed. 672 (1833).

7 "It is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of

This conclusion thus reached in *Barron v. Baltimore* remained the unquestioned law of the first ten amendments from that day to this. Until the adoption of the Fourteenth Amendment in 1868, there was no federal constitutional provision against the violation by a state, of the liberty or property of any person.

The pertinent part of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; . . .

The life, liberty and property of the individual person was thenceforth protected by the Federal Constitution against state encroachment regardless of whether such encroachment took the form of state laws or occurred in or through the official acts of the states' public officers.[8] However, in view of the fact that the natural and constitutional function of state government is to protect the lives, property, health, *morals* and general welfare of its citizens, the Supreme Court soon decided that the Fourteenth Amendment would not be construed to prevent any state from passing and enforcing reasonable police regulations. In other words, state laws which, in a reasonable manner, sought to protect the health, *morals* and general welfare of its citizens were consistently upheld, the Fourteenth Amendment to the con-

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those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, Amendments were proposed by the required majority in Congress and adopted by the States. These Amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them" (ibid). See also Permoli v. New Orleans, 3 Howard 58, 11 L. Ed. 739 (1845), and Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244 (1880).

8 Ex Parte Virginia, 100 U. S. 339, 25 L. Ed. 676 (1880).

trary notwithstanding.[9] It is significant that before and throughout this same period, the First Amendment[10] along with all other provisions of the Federal Bill of Rights, was given a strict, literal interpretation against the acts of Congress. This, of course, for the reason that the federal government has no general police power, and, outside of the District of Columbia and the territories,[11] has no general duty to protect or regulate the health, morals or welfare of individuals.[12]

In spite of the direct and positive limitation that the First Amendment places upon Congress, and in spite of the absence of general federal police power, the Supreme Court has consistently held that *within the sphere of its delegated powers,* Congress may encourage the practice of religion.[13] It may likewise buttress federal territories and institutions against the invasion of *immoral practices,* even when these latter are represented to be religious practices.[14]

The Federal Bill of Rights and the Fourteenth Amendment thus went their separate constitutional ways. It was natural and inevitable, of course, that judicial determinations of certain language in the one would be consulted in con-

9 Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1876); Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205 (1887); Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 32 L. Ed. 253 (1887).

10 "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a re-dress of grievances" (Article I of The Articles, in addition to and Amendment of the Constitution of the United States of America).

11 Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed 864 (1921).

12 Hamilton v. Kentucky Distilleries & W. Co., 251 U.S. 146, 40 S.Ct. 106, 64 L. Ed. 194 (1917).

13 Bradfield v. Roberts, 175 U.S. 291-295, 20 S.Ct. 121, 44 L.Ed. 168 (1899); Quick Bear v. Leupp, 210 U.S. 50, 28 S.Ct. 690, 52 L.Ed. 954 (1908); Arver v. United States (Selective Draft Law Cases) 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918).

14 Davis v. Beason, 133 U.S. 333-342, 10 S.Ct. 299, 33 L.Ed. 637 (1890); Reynolds v. U.S., 98 U.S. 145, 25 L.Ed. 244 (1879); Church of Jesus Christ of L.D.S. v. U.S., 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 792 (1890).

structions of similar language in the other.[15] It must be observed, however, that such constructions were by *analogy*, and *comparison* merely. Not until very recently do we find any decision which expresses or implies the *identification* of the Fourteenth Amendment with any or all of the first eight amendments.[16] For more than fifty years following the adoption of the Fourteenth Amendment the decisions agree that some of the personal rights guarded against national action by the first eight amendments are also protected against state action because a denial of them would be a denial of due process. They likewise agree that this is so, *not because those personal rights are enumerated in the first eight amendments,* but because they are of such a nature that they are included in the conception of due process of law.[17]

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15 "The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress." Hibben v. Smith, 191 U.S. 310, 325, 24 S.Ct. 88, 48 L.Ed. 195 (1903); French v. Barber Asphalt Paving Co., 181 U.S. 324, 329, 21 S.Ct. 625, 45 L.Ed. 879 (1901).

16 "While we need not affirm that in no instance could a distinction be taken, ordinarily if an Act of Congress is valid under the Fifth Amendment it would be hard to say that a State law in like terms was void under the Fourteenth." Carroll v. Greenwich Ins. Co., 199 U. S. 401, 410, 26 S. Ct. 66, 50 L. Ed. 246 (1905).

17 In Twining v. New Jersey, 211 U.S. 98 (1908), the Court examines the view, "That the safeguards of personal rights which are enumerated in the first eight articles of amendment to the Federal Constitution, sometimes called the Federal Bill of Rights, though they were by those Amendments originally secured only against national action, are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action. . . . It is however not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court. The right of trial by jury in civil cases guaranteed by the Seventh Amendment (Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678), and the right to bear arms guaranteed by the Second Amendment (Presser v. Illinois, 116 U.S. 252, 29 L.Ed. 615) have been distinctly held not to be privileges and immunities of citizens of the United States, guaranteed by the Fourteenth Amendment against abridgment by the States, and in effect the same decision was made in respect of the guaranty against prosecution except by indictment of a grand jury, contained in the Sixth Amendment (West v. Louisiana, 194 U.S. 258, 48 L.Ed. 965). In Maxwell v. Dow (176 U.S. 581, 44 L.Ed. 597) where the plaintiff in error had been convicted in a State Court of a felony upon an information, and by a jury of eight persons, it was held that the indictment made indispensable by the Fifth Amendment, and the trial by jury, guaranteed by the Sixth Amendment, were not privileges and immunities of citizens as those words were used in the Fourteenth Amendment. . . . It is possible

In general, the Supreme Court has found it possible to construe the Fourteenth Amendment without any reference to the first eight. In 1923 it said that

> While this court has not attempted to define with exactness the liberty thus guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to *worship God according to the dictates of his own conscience,* and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[18] (Emphasis supplied).

The absence of any reliance upon the language of the First Amendment will be noted in the foregoing quotation. Here the Court was far away from a committment which would have written any one of the first eight amendments into the due process clause of the Fourteenth Amendment. In 1934 the Court re-stated the substance of what it had held eleven years previously:

> There need be no attempt to enumerate or comprehensively to define what is included in the liberty protected by the due process clause (of the Fourteenth Amendment). Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrine on which these students base their objections to the order prescribing military training.[19]

Concurring in the same case Justice Cardozo wrote:

> I assume for present purposes that the *religious liberty* protected by the First Amendment against invasion by the

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that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . *If this is so it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law.*" (Emphasis supplied)

18 Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446 (1923).

19 Hamilton et al., v. Regents of the University of California et al., 293 U.S. 245, 55 S.Ct. 197, 19 L.Ed. 343 (1934).

> nation is protected by the Fourteenth Amendment against invasion by the States. Accepting that premise, I cannot find in the respondents' ordinance an obstruction by the State to the *"free exercise of religion"* as the phrase was understood by the founders of the nation, and by the generations that have followed.[20] (emphasis supplied).

The ordinance, held valid in this case, required able bodied male students of the State University of California to take instruction in military training.

It is well at this point to weigh carefully the foregoing summation of the problem in the language of Justice Cardozo. It was his judgment that *"religious liberty"* was protected by First and Fourteenth Amendments *alike*. In the instant case he was looking for an obstruction to the *"free exercise"* of religion. Up to the time he wrote this opinion, *more than sixty-five years* after the adoption of the Fourteenth Amendment, no decision of the Supreme Court had supported either of the following propositions:

> a.—: That the First Amendment is blanketed into the Fourteenth as a restriction upon the States.
>
> b.—: That the prohibition upon Congress in the First Amendment *respecting an establishment of religion,* is in any way, or for any reason, a restriction upon the States.

Both of the foregoing propositions are sustained in the *McCollum* case. The authority for these extraordinary additions to the scope of the Fourteenth Amendment must therefore be found—if indeed such authority is to be found anywhere—in the judicial developments of the past fourteen years.

After the *Hamilton* case,[21] the first important expression of the Supreme Court upon this subject came in the course of a 1940 decision holding that a Connecticut statute

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20 Hamilton et al. v. Regents etc. *supra,* Page (S.Ct.) 205.

21 Hamilton et al. v. Regents etc. *supra.*

prohibiting the solicitation of money for alleged religious, charitable, or philanthropic purposes without approval of the Secretary of Public Welfare, amounted to a state censorship of religion.[22] As such, the Court held that its enforcement deprived the appellant of his liberty without due process of law. The appellant Cantwell was a Jehovah's Witness and his "solicitation" took the form of insulting Catholics on the streets of New Haven, Connecticut by asking them to listen to a phonograph record "Enemies," which attacked the Catholic religion. Since Cantwell had not applied for a certificate he was arrested and found guilty of violating the statute. In the course of the Court's decision, Justice Roberts said:—

> We hold that the statute as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The Fundamental concept of liberty embodied in that Amendment *embraces the liberties* guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law *respecting an establishment* of religion or prohibiting the free exercise thereof. (sic). The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to pass such laws. The Constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand it safeguards the free exercise of the chosen form of religion. . . . Such censorship (the secretary of public welfare was authorized by the statute to withhold the certificate if he determined that the cause was not religious) of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and *included in the liberty which is within the protection of the Fourteenth.* (emphasis supplied).

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

Here the court makes it reasonably plain that it regards state laws "respecting an establishment of religion" and state laws "prohibiting the free exercise thereof" to be equally and simultaneously outlawed by the Fourteenth Amendment's embracement of the First.

This was a brand new principle of constitutional law and it is perhaps for that reason that *this long and labored passage in the Cantwell decision is completely without supporting documentation.* For the purpose of Cantwell's liberation it was not necessary for the court to travel this great distance. The appellant's activities might well have been considered to be a part of the "religious liberty" and "free exercise of religion" upheld by Justice Cardozo in the *Hamilton* case.[23]

On June 3, 1940, a few weeks after it decided the *Cantwell* case. the Supreme court held that consistently with the Constitution of the United States, state school authorities could require that all public school children render a daily salute to the flag of the United States and expel those who refused to do so.[24] For the purposes of this decision, Justice Frankfurter, speaking for the Court, found it unnecessary to do more for the merger of the First and Fourteenth than to refer to the "Bill of Rights". He admonished the dissidents "to fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena."

But in his vigorous dissent Justice Stone was more to the point:

> The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion which *concededly (sic) are forbidden by the First*

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23 Hamilton et al. v. Regents etc. *supra.*

24 Minersville School District v. Gobites, 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940).

> *Amendment* "and" are violations of the liberty guaranteed by the Fourteenth. For by this law the state seeks to coerce these children to express a sentiment which . . . they do not entertain and which violates their deepest religious convictions. (emphasis supplied).[25]

Observe Justice Stone's statement that obnoxious state laws are forbidden by the First *"and"* the Fourteenth Amendment. There is a nice lack of discrimination here, which although unimportant in a dissenting opinion and wholly beside the point involved in the case he was discussing, presages precisely what was yet to come.

In the spring of 1943, some of Jehovah's Witnesses were back again.[26] In the meantime the Court had experienced a change of heart. It now outlawed the compulsory flag salute and the *Gobites* case was thus expressly overruled. In delivering the court's opinion, Justice Jackson becomes explicit about the new affinity between the First and Fourteenth Amendments:—

> To sustain the compulsory flag salute we are required to say that a *Bill of Rights* (sic) which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind. Whether the *First Amendment* (sic) to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad, or merely innocuous . . .
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> The Fourteenth Amendment as *now* applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important delicate and highly discretionary functions, but none that they may not perform within the limits of the *Bill of Rights*. . . . The very purpose of a *Bill of Rights* was to withdraw certain subjects from the vicissitudes of political controversy. . . .[27] (emphasis supplied).

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25 Minersville etc. *supra,* note 24 at 601.

26 West Virginia State Board of Education et al. v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

27 *Supra,* page 634, 637, 638.

But there is more on this subject:—Not merely the First now, but each and all of the First Eight Amendments, (The Federal Bill of Rights) are being corralled into the confines of the Fourteenth Amendment:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment, and those cases in which it is applied for its own sake. *The test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved.* Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.
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> . . . It is important to note that while it is the Fourteenth Amendment which bears directly upon the state *it is the more specific limiting principles of the First Amendment that finally govern this case.* . . . True, the task of translating the majestic generalities of the *Bill of Rights,* conceived as a part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the Twentieth Century, is one to disturb self-confidence. These principles grew in a soil which also produced a philosophy *that the individual was the center of society,* that his liberty was attainable through mere absence of governmental restraints and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We *must transplant* these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. *These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment.* (emphasis supplied)[28]

As Constitutional Law, practically everything stated by Justice Jackson in the foregoing quotation is as completely without precedent as the law he applied in the Nurnberg Trials. "Precedents" have been deprived of "reliability" now, and for future interpretations of the Fourteenth

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28 *Id* at 639, 640.

Amendment, we are cast upon the "judgment" of Justice Jackson and his associates.

In their concurring opinion Justice Black and Justice Douglas speak of the First and Fourteenth Amendments indiscriminately and although Justice Frankfurter in his dissent condemns the entire opinion, book, page, and verse, he finds no fault with the conclusion that "the First Amendment has been read into the Fourteenth."[29]

All of the "First and Fourteenth Amendment" cases between *Hamilton v. The Regents*[30] and *Everson v. Board of Education,*[31] involved the right of individuals to be free from one or another form of coercion commanded by state laws. Each case involved an alleged infringement of the litigant's right to speak out, act, propagandize or refrain from such public profession as was involved in a flag salute. Their common denominator was the alleged state interference with religious freedom. In none of these cases was the state accused of preferring one religion over another, or of officially encouraging any or all religions. For this reason the specific prohibition in the First Amendment against *affirmative* acts "concerning an establishment of religion" was considered for the first time in the *New Jersey School Bus* case, decision delivered on February 10, 1947. In this case a New Jersey Statute authorized local New Jersey School districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, pursuant to the statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by public transportation systems. Part of this money was for the payment of transportation of Catholic children to Catholic Parochial

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29 *Id* at 650.

30 *Supra.*

31 Everson v. Board of Education of the Township of Ewing et al., 330 U. S. 1, 67 S. Ct. 962, 91 L. Ed. 711 (1947).

Schools. It was urged among other things that this payment amounted to "a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the State".[32] Any reliance upon the First Amendment in the *Jehovah's Witness* cases had been gratuitous and unnecessary. Here, however, *religious freedom* was not involved. Now, *for the first time*, the question of whether the First Amendment *in all of its provisions* was part of the Fourteenth, was vital to a decision of the case.

In delivering the opinion of the Court, Justice Black stated:

> But if the law is invalid . . . *it is because it violates the First Amendment's prohibition against the establishment of religion by law*. . . . The New Jersey Statute is challenged as a law respecting an establishment of religion. *The First Amendment as made applicable to the States by the Fourteenth,* Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 . . .[33] commands that a *state* "shall make no law respect-

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32 *Id* at 5.

33 (1943) This was another Jehovah's Witness case. It involved the right of petitioners to distribute handbills from door to door without a license required by law. The statement in the Courts decision that "The First Amendment, which the Fourteenth Amendment makes applicable to the States declares, etc." (quoting the Amendment). Neither decisions nor other authority is cited to substantiate this conclusion which is apparently relied upon by the Court in the Everson Case to support a similar statement made there. In a dissenting opinion to the *Murdock* Case, Justice Reed says: "The real contention of the witnesses is that there can be no taxation of the occupation of selling books and pamphlets because to do so would be contrary to the due process clause of the Fourteenth Amendment which is now held to have drawn the contents of the First Amendment *into the category of individual rights* protected from State deprivation", citing Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) Near v. Minnesota, 283 U .S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) and Cantwell v. Connecticut, note 22 *supra*. The *Gitlow* case said merely that *"freedom of speech and the press*—which are protected by the First Amendment *from abridgment by Congress*—are *among* the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." In the *Near* case Justice Hughes, speaking for the court stated: "It is no longer open to doubt that the liberty of the press and of speech is within the liberty *safeguarded by the due process clause of the Fourteenth Amendment* from invasion by State action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and guaranty of fundamental rights of person and property."—Here is no mention of the First Amendment at all. The *Cantwell* case has already been discussed herein, at note 22 *supra*.

> ing an establishment of religion, or prohibiting the free exercise thereof." . . . Whether this New Jersey law is one respecting the "establishment of religion" requires an understanding of the meaning of that language particularly with respect to the imposition of taxes. . . . The "establishment of religion" clause of the First Amendment 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. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions. . . . Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State" [34] (emphasis supplied).

The court, over violent dissent by four justices finally decided that the New Jersey Law provided for an indiscriminate public service to the children involved and did not result in "an establishment of religion". But the stage was now set for Vashti McCollum. When the Court stated that now, American government is just as powerless to "aid all religions" as it is to "prefer one religion over another" or "set up a church" it reduced the *McCollum* case to a mere question of fact. First of all it is one thing and a proper thing to protect a Jehovah's Witness in his undoubted right to religious freedom or to freedom of speech. To do this effectively it was entirely unnecessary for the Supreme Court to twist and torture the First Amendment into its consideration of the Fourteenth. The decision of Justice Sanford in the *Gitlow* case [35] like that of Chief Justice Hughes in *Near v. Minnesota,*[36] protected these basic liberties against state violation

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34 Everson v. Board, *supra* note 31, at 16.

35 See note 33, *supra.*

36 See note 33, *supra.*

without any reference to the First Amendment. It is ironical that both of these decisions are cited by the present court in its frequent assertions that the First Amendment is now a part of the Fourteenth.[37] By turning the First

[37] To say that the Framers of the Fourteenth Amendment intended to bring the First Amendment into it in terms is to overlook one revealing and contradicting chapter of our history. Here is the recital of this chapter from *American Church Law* by Carl Zollman, pages 75-76: Events now followed fast on each other's heels. Grant, in his annual message of 1875, recommended an amendment to the United States Constitution forbidding the teaching in any public school of religious tenets and further prohibiting "the granting of any school funds, or school taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination." One week after the submission of this message, James G. Blaine, the plumed knight, who was then the leader of the House, and who, nine years later, was defeated by Grover Cleveland in a contest for the presidency, introduced a rather colorless resolution for a constitutional amendment which on August 4, 1876, was overwhelmingly passed by the House. The famous Tilden-Hayes campaign in the meantime had come into being, and this matter now became one of its issues. Accordingly, the Republican National Platform of 1876 called for an amendment to the Federal Constitution forbidding "the application of any public funds or property for the benefit of any school or institution under sectarian control. When the constitutional amendment, submitted by Blaine, in a greatly strengthened form, was finally voted on in the Senate, it resulted, on August 14, 1876, in a strictly partisan vote, all Republican Senators voting for and all Democratic Senators voting against it, and was lost because it had not received the necessary two-thirds majority. With this vote the agitation for a federal amendment has come to an end.

And here is the Amendment which was an issue in the Presidential election of 1876. Remember that the Fourteenth Amendment had been in effect since 1868: 4 CONG. REC. pt. 1, XX, 5580. This resolution reads as follows: *"No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof;* and no religious test shall ever be required as a qualification to any office or public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article." If the Fourteenth Amendment embraced the First in 1868, why did Congress feel it necessary in 1876 to attempt to propose *another* amendment *specifically* restricting the states in the terms used to restrict Congress in the First Amendment? Since this suggested specific prohibition against State established religions was expressly rejected by Congress, in 1876, by

Amendment in all of its terms into a restriction upon the states, the Court has added nothing to the security of full personal freedom that was not already provided for it by the Due Process Clause of the Fourteenth. By this process however the Court has outlawed every affirmative act by state government that may subsequently be construed to *"aid all religions"*. The full implication of this restriction is too broad for immediate comprehension but before the *McCollum* case left the Supreme Court at least one of the concurring justices had begun to be apprehensive about them. In his concurring opinion Justice Jackson stated:

> I think . . . that we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain. . . . I make these reservations as a matter of record *in view of the number of litigations likely to be started as a result of this decision.* . . . The plaintiff, as she has every right to be, is an avowed atheist. What she 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 that there is a God. . . . This Court is directing the Illinois Courts generally to sustain plaintiff's complaint without exception of any of these grounds of complaint, without discriminating between them and without laying down any standards to define the limits of the effect of our decision. . . . While we may and should end such formal and explicit instruction as the Champaign plan . . . I think it remains to be demonstrated whether it is possible even if desirable, to comply with such demands as plaintiffs' *completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction.* (emphasis supplied)[38]

Justice Jackson may well worry about the future of American education "isolated" and cast off from all that Vashti McCollum may reasonably regard as religious. A few of the many and widely diversified materials that would

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virtue of what does the Supreme Court write it into the Constitution in 1948? It will likewise be noted that the suggested but rejected 1876 Amendment was far less severe in its terms than the restrictions now written into the Fourteenth Amendment by the Supreme Court in the *McCollum* decision.

38 See note 1, at page ——.

have to be removed from the study of American history and government as a pre-requisite to the establishment of such a godless system of education are: The Declaration of Independence, The Mayflower Compact, Washington's Farewell Address, Lincoln's Gettysburg Address, Madison's Journals of the proceedings of the Federal Constitutional Convention, Thomas Paine's *Common Sense,* The Articles of Confederation, the Northwest Ordinance of 1787 [39], The Constitutions of practically every State in the Union, including Vashti McCollum's own state of Illinois [40], and last but not least The Constitution of the United States itself, to which this atheist appealed for "an establishment" of isolated secular religion. For who, after all is this "Our Lord" referred to just above the signature of "George Washington, President, and Deputy from Virginia"?

Granting the Court's defacto application of the First Amendment to the States, it should have gone no farther than to prevent the official establishment or encouragement of one preferred sect of religion over another with its implicit burdens and or disqualifications upon non-conformers. This has been the complete goal of all "dis-establishers" since the passage of the English Conventicle Act in 1665. To say that dis-establishment or no establishment requires the complete secularization of government is to confuse the sepa-

39 "Article III. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education shall forever be encouraged." It will be observed that knowledge was third in the order of time and importance in the education system envisioned for the Northwest Territory of which Illinois is a part. The congressional Enabling Act of 1818, expressly provided that the Constitution for the proposed State of Illinois should not be repugnant to the provisions of the Ordinance of 1787 above quoted. Except when its provisions conflict with the Constitution of Illinois, the Ordinance of 1787 is still in effect in that state, Phoebe v. Jay, 1 Ill. 268 (1828).

40 "We the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to *Him* for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquility, provide for common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the State of Illinois."

ration of Church (creed) and State with an entirely different concept which would separate and isolate Religion from Government and Law. At the present time, each of the United States has accomplished the first type of separation at the state level, but no existing government anywhere with the exception of Soviet Russia and her recently acquired Communist satellites has pretended to accomplish the second. If the *McCollum* case decides that we must purge our official life, state and federal, of religious practices, and observances, then it amounts to a prescription for American revolution. How can governments, state and federal, organized "to secure these rights" with which we are endowed "by our Creator" officially divorce themselves from necessary presuppositions involving God and Eternity? Where and in what period of American history was such a notion ever entertained?

Here is what another Supreme Court of the United States said upon this subject in 1892: Its importance to this issue requires that it be quoted at length.

> But beyond all these matters, no purpose of action against religion can be imputed to any legislation, State or Nation, because *this is a religious people.* This is historically true. From the discovery of this continent to the present hour there is a *single voice* making this affirmation. The commission to Christopher Columbus prior to his sail westward is from "Ferdinand and Isabella, by the grace of God,—King and Queen of Castile," and recites that "it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered." The first colonial grant, made to Sir Walter Raleigh in 1584, was from "Elizabeth by the grace of God, of England and Ireland queen, defender of the faith". The grant authorizes him to enact statutes for the government of the proposed colony provided that "they be not against the true Christian faith". The first Charter of Virginia . . . commenced the grant in these words: We greatly commending and graciously accepting of their desires for the furtherance of so noble a work, which may by the Providence of Almighty God, hereafter tend to the Glory of his divine Majesty, in propagating of Christian religion to such people as

yet live in darkness and miserable ignorance of the true knowledge and worship of God . . . Language of similar import may be found in the subsequent charters of that colony . . . and the same is true of the various charters granted to the other colonies. In language more or less emphatic is the establishment of the Christian religion declared to be one of the purposes of the grant. The celebrated compact of the Pilgrims in the Mayflower, 1620, recites: "Having undertaken for the Glory of God and advancement of the Christian faith, and the honor of our King and Country, a Voyage to plant the first Colony in the northern parts of Virginia: Do by these Presents, solemnly and mutually, in the presence of God and one another, covenant and combine ourselves together into a Civil Body Politick, for our Better ordering and preservation, and Furtherance of the Ends aforesaid."

The fundamental orders of Connecticut, under which a provisional government was instituted in 1638-1639, commence with this declaration: "Forasmuch as it hath pleased All-mighty God by the wise disposition of his divyne pruidence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and upon the river of Conectecotte and the Lands thereunto adjoining; and well knowing where a people are gathered together the word of God requires that to mayntayne the peace and union of such a people *there should be an orderly and decent Government established according to God,* to order and dispose of the affairs of the people at all seasons as occasion shall require; do therefore associate and conioyne our selves to be as one Publike State or Commonwealth; and do, for our selves and our Successors and such as shall be adjoined to us at any time hereafter, enter into Combination and Confederation together, to maintain and preserve the liberty and purity of the gospel of our Lord Jesus, we now profess, as also the disciple of the Churches, according to the truth of the said gospel is now practiced amongst us."

In the charter of privileges granted by William Penn to the province of Pennsylvania, in 1701, it is recited: "Because no People can be truly happy, though under the greatest enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; and Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who

only doth, enlighten the Minds, and persuade and convince the Understandings of people, I do hereby grant and declare," etc.

Coming nearer to the present time, the Declaration of Independence recognized the presence of the Divine in human affairs in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." "We, therefore the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name and by Authority of the good people of these colonies, solemnly publish and declare," etc.: "and for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our Sacred Honor."

If we examine the constitution of the various states we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four states contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. This recognition may be in preamble, such as is found in the Constitution of Illinois, 1870; "We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations," etc.

It may be only in the familiar requisition that all officers shall take an oath closing with the declaration "so help me God." It may be in clauses like that of the Constitution of Indiana, 1816, article XI., section 4: "The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed the most solemn appeal to God." Or in provisions such as are found in Articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, 1867: "That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law, to be molested in his person or estate on

account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace, or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief: *Provided, He believes in the existence of God, and that, under his dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come.* That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this constitution." Or like that in articles 2 and 3, of Part 1st, of the Constitution of Massachusetts, 1780: "It is the right as well as the duty of all men in society publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe.

. . . As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality, and as these cannot be generally diffused through a community but by the institutions of the public worship of God and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth, have a right to invest their Legislature with power to authorize and require and the Legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily." Or as in sections 5 and 14 of article 7, of the Constitution of Mississippi, 1832: "No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State. . . . Religion, morality, and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools,

and the means of education shall forever be encouraged in this State." Or by Article 22 of the Constitution of Delaware, 1776, which required all officers, besides an oath of allegiance, to make and subscribe the following declaration: "I, A.B., do profess faith in God, the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and new Testament to be given by divine inspiration."

Even the Constitution of the United States which is supposed to have little touch upon *the private life of the individual,* contains in the 1st Amendment a declaration common to the constitutions of all the States, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." etc. And also provides in article 1, section 7; (a provision common to many constitutions); that the Executive shall have ten days (*Sundays excepted)* within which to determine whether he will approve or veto a bill.

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; *they are organic utterances;* they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updgraph v. Com.* 11 Serg. & R. 394, 400 it was decided that "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . *not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men."* And in *People v. Ruggles,* 8 Johns, 290, 294, 295, *Chancellor Kent,* the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but even in respect to the obligations due to society, is a gross violation of decency and good order. The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that

> right. Nor are we bound, by any expressions in the Constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet or of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines of worship of those impostors." And in the famous case of *Vidal v. Girard*,[43] U. S. 2 How. 127,198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed; "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."
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> If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following:
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> The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath; with the general cessation of all secular business, and the closing of courts, Legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.[41] (emphasis supplied).

Nothing needs to be added to Justice Brewer's masterful and complete documentation. In this respect, the Constitution of the United States is the same to-day as it was when this opinion was delivered in 1892. It is obvious, however, that something of a very material nature has since been added to the popular as well as the judicial concept of Amer-

41 Church of the Holy Trinity v. United States, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892).

ican institutions. Principles formerly taken for granted are now denied. William Penn startled nobody when he said that those men who will not be governed by God must be ruled by tyrants. A hundred years later the first Constitution of the State of Pennsylvania provided that:

> All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding; and that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to or against, his own free will and consent: Nor can any man *who acknowledges the being of a God,* be justly deprived or abridged of any civil right, as a citizen, on account of his religious sentiments or peculiar mode of religious worship; and that no authority can or ought to be vested in or assumed by any power whatsoever, that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship. (Emphasis supplied).

Yet at the same time, as a matter of course and without popular objection the same Constitution provided:

> And each member (of the House of Representatives), before he takes his seat, shall make and subscribe the following declaration:
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> "I do believe in God, the Creator and governor of the universe, the rewarder of the Good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration." And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this state.[42]

This was substantially the requirement in all of the original states at that time. The "wall of separation" was purposely kept low enough to permit the state government to benefit by divinely revealed truth in the possession of legislators who recognized and believed it. Whatever may be the prevailing modern view, on and off of the bench, with reference to the secularization of government, the record is

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42 Pa. Const. Art. II, § 10 (1776). POORE, FEDERAL AND STATE CONSTITUTIONS II, 1541-42 (1878).

clear on the point that the Founding Fathers would have none of it. Whatever may be the present state of the popular mind on the subject of the strictly secular state, it is certainly not the type or kind of government enshrined in our American constitutional system. A deliberate turn to godless government augurs more than is involved in such eminently practical matters as continued tax exemption for churches, the modification of our coinage, and the status of present laws against blasphemy and immorality. On the theoretical side such a turn takes us immediately to the base and foundation of personal rights. If these rights are divine endowments, as the Declaration of Independence says they are, no government that guards them can ever be completely godless. On the contrary, if as in the secular state, there is no official recognition of the divine, personal rights remain only so long as they are tolerated by government. This, of course, is tyranny. What the "Wall of Separation" erected in the *McCollum* case really does, is to fence man off from his time-honored right of Sanctuary.

Clarence E. Manion.