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Application of the First Amendment to the States by the Fourteenth Amendment of the Constitution

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THE APPLICATION OF THE FIRST AMENDMENT TO THE STATES BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION

Under the Constitution of the United States a dual form of government exists, namely, a federal government and state governments. This principle of duality is found in the fact that the government of the United States is one of enumerated and implied powers; the state governments, those of reserved powers. Significant enumerated powers of the federal government are expressed in Article I, Section 8, and in Article II, Section 2 of the Constitution. The Tenth Amendment gives testimony that subsidiary powers are reserved to the states: The "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Certain sovereign powers are delegated to the United States that are prohibited to the states, such as the power to coin money or to make treaties: Article I, Section 10, Clause 1.

When the Constitution was sent to the states for ratification, in 1787, there was criticism because the Constitutional Convention that framed the document had not incorporated into it a bill of rights. Fear was expressed in the states that without specific guarantees, written into the law, civil rights and liberties of the people might be jeopardized by a federal government, possessing a vast array of powers which the Constitution delegated to it. The Constitution was ratified by the people through state constitutional ratifying conventions, but with the assurance that a bill of rights would immediately be incorporated into it, restraining the federal government in behalf of individual liberty. Pressing for a bill of rights, statesmen at the time evidently thought of such constitutional provision only in terms of its becoming a restraint on the federal government. Between the lines of his argument against a bill of rights,

Hamilton testified to this, for he impliedly said that to prohibit the federal government from doing things outside the scope of its delegated authority would not only be unnecessary but unwise; adding, "the Constitution itself, if adopted, will be a bill of rights for the Union." [1]

The first ten Amendments to the Constitution were adopted by the necessary number of states ratifying the Constitution [2] in the interim, 1788-1789. This Bill of Rights of the Constitution was declared in force December 15, 1791. The First Amendment declares that "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 people peaceably to assemble, and to petition the Government for a redress of grievances." It is clear that the prohibitions of the First Amendment are on Congress, the lawmaking body of the federal government, and that the First Amendment is not applicable to the states as a restraint on them; it is deducible that not any of the amendments of the federal Bill of Rights, couched in terms of general prohibitions, blanket the states.[3] In the first quarter of the nineteenth century,

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1 Hamilton: THE FEDERALIST, LXXXIV

2 U. S. CONST. ART. VII. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution beween the states so ratifying the same.

3 Generally, in their respective bills of rights, state constitutions restrained their governments. Although between the late eighteenth and the middle nineteenth centuries a few states restrained the free exercise of religion and discriminated against particular religious groups, on the other hand, many states constitutionally provided for religious freedom. Under the first organizations of state governments in view of early state constitutions, the elector was generally a freeholder subject to religious qualifications. But in the struggle for the extension of the franchise which began with the westward movements of populations and the spread of Jeffersonian democracy, religious qualifications for electors began to disappear from state constitutions. In the early nineteenth century, new state constitutions began to provide that no religious tests should be required as a qualification for voting or for holding public office under the state; or the civil rights and privileges of state citizens be affected by their religious principles. *Cf.* state constitutions of Indiana, 1816, Art. I, Sec. 3; Illinois, 1818, Art. VIII, Sec. 4; Alabama, 1819, Art I, Sec. 7; Maine, 1820, Art. I, Sec. 5; Michigan, 1837, Art. II, Sec. 3; Texas, 1845, Art. I, Sec. 3; Minnesota, 1857, Art. I, Sec. 17; Oregon, 1857, Art. I, Sec. 4; Nebraska, 1866, Art. I, Sec. 18; Louisiana, 1868, Art. 12; Mississippi, 1868, Art. I, Sec. 18.

however, the notion was advanced that civil liberty guarantees of the Bill of Rights ought to be construed as restraints on state governments as well as on the federal government. This was the contention of the plaintiff in the case of *Barron v. Baltimore,* decided in 1833.[4] In paving its streets the city of Baltimore had diverted certain streams, causing them to deposit sand and gravel near the wharf of a certain Barron, making the water around his wharf too shallow for the approach of vessels. Barron's wharf had formerly been surrounded by the deepest water in the harbor, but now it was useless to him. The state court reversed a verdict of $4,500 for Barron and a writ of error was taken to the Supreme Court of the United States. It was alleged by Barron that the city of Baltimore violated the eminent domain clause of the Fifth Amendment, which declares that private property shall not be taken for public use without just compensation.[5] In delivering the opinion, Chief Justice Marshall felt compelled to declare that the Court had no jurisdiction in the case. In substance, it was held that the Constitution was ordained and established by the people of the United States for themselves; this was declared in the Preamble. It was not established for the government of the states. Each state established a constitution for itself, and in it provided such limitations on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as seemed best adapted to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on its power, if ex-

4 7 PETERS 243, 8 L. Ed. 672.

5 Had the Fourteenth Amendment been operative then as now, Barron would have had redress under its due process clause. Chief Justice Marshall holding there was no redress in the Supreme Court of the United States, Barron was without compensation for his loss of property. His cause, however, was long remembered and reverted to in 1866 when, after the Civil War, the congressional Committee of Fifteen on Reconstruction was drafting the Fourteenth Amendment. Because of the times, it appeared that the Amendment was adopted solely to secure the rights of freedmen hampered by the South. When the Amendment was proposed the intention was that. But there were two groups on the Committee

pressed in general terms are naturally and necessarily applicable to the government created by that instrument. If in the ninth and tenth sections of Article I of the original Constitution, a plain line is drawn of discrimination between the limitations it imposes on the powers of the federal government and on those of the states, if in every inhibition intended to act on state power, words are used that directly express the intent, then strong reason must be assigned for departing from this safe and judicious course in framing the Amendments before that departure can be assumed. The Chief Justice went on to say that he searched in vain for the reason; that the Bill of Rights adopted by the states contain no expression that would indicate an intention to apply them to the states.

More than a century after this pronouncement by Chief Justice Marshall, the Fourteenth Amendment, adopted in 1868, was construed to make the First Amendment applicable to the states. In the case of *Cantwell v. Connecti-*

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drafting it, one bent on establishing, under the federal constitution, the rights of the recently freed Negro against state legislation; the other group determined to include the property and other rights of persons in the whole range of the country's economy, for at that time the industrial revolution had given rise to great corporations for profit, and railroad corporations were suffering from discriminating state taxes. Eminent corporation lawyers in the persons of John Brigham and Roscoe Conkling belonged to the latter group. Brigham succeeded in incorporating the due process clause into the draft. He used the words of the Fifth Amendment qualified by "nor shall any state." When the original Constitution was drafted, Negro slaves were referred to in it, as "persons" (Art. I, Sec. 2 Cl. 3; Sec. 9, Cl. 1; Art. IV, Sec. 2, Cl. 3). Thus when the Fourteenth Amendment used *person* in the due process clause, it was taken to mean just the freedman: *Cf.* Slaughterhouse Cases (1873), 16 Wall. 36, 21 L. Ed. 394. Using the word "person" Brigham had another meaning. He recalled Barron's plight in 1833, and had always thought that it was shortsightedness in the framers to have made no provision in the law for the protection of the individual against the *states*. He therefore designed the "cabalistic" clause and got it into the Constitution, so that "the poorest man in his hovel as well as the prince in his palace may have security in his property" against the states. In 1882, arguing a tax case, Roscoe Conkling laid before the Supreme Court the unpublished journal of the Committee of Fifteen with the intentions of Brigham in the record. In view of this, Conkling argued that the due process clause protected *any* person, therefore a corporation. The Court thereafter began to adhere to the doctrine that the Fourteenth Amendment imposes judicially enforceable restrictions on state social legislation: *Cf.* San Mateo County v. Southern Pacific Railroad Co., 116 U. S. 136 (1886).

cut,[6] decided in 1940, the Court held that the fundamental concept of "liberty," embodied in the Fourteenth Amendment, embraces the liberties guaranteed by the First Amendment, which declares that Congress shall enact no law respecting an establishment of religion or prohibiting the free exercise thereof. The Court went on to state that the Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact laws which will deprive individuals of their liberty without due process of law; that although the right to free exercise of a chosen form of religion is not absolute because conduct remains subject to regulation for the protection of society, yet the power to regulate must be so exercised as not, in obtaining a permissible end, unduly to infringe protected freedom; nor may a state by statute wholly deny the right to preach or to disseminate religious views. Because the Connecticut statute involved in this case prohibited solicitations of money for religious, charitable, or philanthrophic causes without approval of the secretary of public welfare, and authorized the

[6] 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). Newton Cantwell and two sons, Jesse and Russell, members of Jehovah's Witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut. Each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County, each of them was convicted on the third count, which charged a violation of a section of the general statutes of Connecticut, and on the fifth count, charging commission of the common law offense of inciting a breach of the peace. On appeal to the Supreme Court the conviction of all three was affirmed. The conviction of Jesse Cantwell was affirmed on the fifth count, but the conviction of Newton and Russell on that count was reversed and a new trial ordered as to them. By demurrers to the information, by requests for rulings of law at the trial, and by their assignments of error in the state Supreme Court, the appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because, on its face as it was construed and applied, it denied them freedom of speech and prohibited their free exercise of religion. In like manner they made the point that they could not be found guilty on the fifth count, without violation of the Amendment. The Supreme Court declared it had jurisdiction on appeal from the judgments on the third count, as there was drawn in question the validity of a state statute under the Federal Constitution, and the decision was in favor of the validity. Since the conviction on the fifth count was not based upon a statute, but presented a substantial question under the Federal Constitution, the Court granted the writ of certiorari in respect of it. The judgment affirming the convictions on the third and fifth count was reversed, and the cause was remanded for further proceedings not inconsistent with this opinion.

secretary, upon application of any person in behalf of such cause, to determine if such cause is a religious one or a *bona fide* object of charity, of philanthropy, the Court held that the law violated the First and Fourteenth Amendments to the extent that it authorized a censorship of religion by the secretary through power conferred on him to withhold his approval.

Subsequent to the *Cantwell* case, other cases came before the Court in which state legislation was challenged in view of "liberty" in the due process clause of the Fourteenth Amendment, as blanketed by the First Amendment. In *Largent v. Texas,*[7] decided in 1943, a city ordinance was held unconstitutional as abridging freedom of religion, of speech, and of the press. In this case the ordinance required a permit to solicit for or to sell books within the residential part of the city, and it authorized the mayor to issue a permit after a thorough investigation.[8] The ordinance was held unconstitutional as applied to the distribution of religious publications by a member of a religious sect. In *Jamison v. Texas,*[9] decided in 1943, the Court ruled that the right to distribute on the streets handbills concerning religious subjects

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7 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873.

8 A Mrs. Largent was charged with violating a city ordinance making it unlawful for any person to solicit orders or to sell books, 'wares, or merchandise within the residential portion of the city without a permit. The appellant's evidence showed she carried a card of ordination from the Watch Tower Bible and Tract Society, that organization a part of Jehovah's Witnesses. The Witnesses, founded upon and drawing from the tenets of Christianity, is an evangelical group. Mrs. Largent was convicted for violating this ordinance, and she appealed to the county court of Lamar county, where a trial *de novo* was had, in view of a Texas statute. There a motion was filed to quash the complaint because the ordinance violated the Fourteenth Amendment, and at the conclusion of the evidence a motion 'was filed on the same grounds for a finding of not guilty and the discharge of the appellant from custody. Both were overruled. Appeal was brought into the Supreme Court.

9 This was another Texas case in which the appellant, a member of the Jehovah's Witnesses, was charged with distributing handbills on the streets of Dallas, Texas, in violation of an ordinance that prohibited their distribution: 318 U. S. 413, 63 S. Ct. 699, 87 L. Ed. 869.

For elaborate arguments on the First Amendment, prior to its later application to the states by the Fourteenth Amendment, *Cf.* Terrett v. Taylor, 1914, 9 Cranch 43, 3 L. Ed. 650; Watson v. Jones, 1872, 13 Wall. 670, 20 L. Ed. 666. See also, Reynolds v. United States, 1878, 98 U. S. 182, 25 L. Ed. 244.

may not be prohibited at all times, at all places, and under all circumstances. The Court held an ordinance prohibiting the dissemination of information on the streets by handbills, unconstitutional, as applied to handbills inviting the public to meetings of a religious sect, at which no admission fee was charged. The ordinance was held to deny freedom of religion and the press, rights protected by the First Amendment.

In the case of *Murdock v. Pennsylvania,*[10] decided in 1943, holding that the Fourteenth Amendment makes the First Amendment applicable to the states, the Court rendered the opinion that the spreading of one's religious beliefs through the distribution of religious literature or preaching the Gospel is an age-old type of evangelism that is given protection under constitutional guarantees of freedom of speech, of the press, and of religion. A license tax for such solicitation drew from the Court this deduction: The fact that the ordinance requiring this license tax is nondiscriminatory is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with wares and merchandise of hucksters and peddlers and treats them all alike. Such equality of treatment does not save the ordinance. The freedom of press, speech, and religion are in a preferred position. It could hardly be denied, the Court said, that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed is in substance just that. In *West Virginia State Board of Education v. Barnette,*[11] decided in 1943, the Court held that the

10 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943). Petitioners in this case were also Jehovah's Witnesses, who went from door to door soliciting people to purchase certain religious books. This was held in violation of a city ordinance that required the solicitor to pay a license tax.

11 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). This suit was brought by Walter Barnette and others against the West Virginia State Board of Education and others, for an injunction to restrain enforcement of an order requiring children in public schools to salute the American flag. From a decree

Fourteenth Amendment, as applied to the states, protects the citizen against the state itself and all its creatures including boards of education. Holding invalid the challenged resolution, the Court declared that it denied freedom of speech and worship; that it transcended the constitutional limitations placed on the board's power, and invaded the sphere of the spirit and the intellect, which it is the purpose of the First Amendment to reserve from all official control. Referring to the First Amendment as applied to the States by the Fourteenth Amendment, the Court expressed the opinion that the test of legislation colliding with the First Amendment is much more definite than the test when only the Fourteenth Amendment is involved; that much of the vagueness of the due process clause disappears when the specific prohibitions of the First Amendment become its standard.

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granting an injunction the defendants appealed. The Board had adopted, in 1942, in view of a state statute, a resolution that contained recitals largely from the Court's opinion in the *Gobitis* case, 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940). The resolution ordered the salute to the flag to become a regular part of the program of activities in the public schools. All teachers and pupils were required to participate in the salute. Refusal so to salute was to be regarded as an act of insubordination, to be dealt with accordingly. The salute that was originally required brought protests from various groups including the Red Cross, Parent and Teacher Associations, and the Boy and Girl Scouts, and some modification was made in deference to these objections. But no concession was made to Jehovah's Witnesses. Failure to conform being considered insubordination, the penalty was expulsion from school. The expelled child being held unlawfully absent, he could be proceeded against as a delinquent. The appellees, citizens of the United States, brought suit in the United States District Court, asking its injunction to restrain enforcement of those laws against Jehovah's Witnesses. The Witnesses are an unincorporated body, teaching that the obligation that is imposed by the law of God is superior to man-made laws for temporal governments. They adhere to the literal version of *Exodus,* XX 4, 5, and consider the flag as an "image" within this divine command. For that reason they refuse to salute it. The Board of Education moved to dismiss the complaint of parents of children who were threatened with prosecution for causing delinquency, the plaintiffs alleging that the laws and regulations were an unconstitutional denial of religious freedom secured by the First Amendment, and a violation of the Fourteenth Amendment due process of law and equal protection of law clauses. The District Court restrained the enforcement as to the plaintiffs and those of that class. The Board of Education brought the case to the Supreme Court by direct appeal: 28 U. S. C. Sec. 380 U. S. C. A.

See also Follett v. Town of McCormick, 321 U. S. 573, 64 S. Ct., 717, 88 L. Ed. 938 (1944). Marsh v. Alabama, 327 U. S. 573, 66 S. Ct. 276 (1946).

In 1947, the Court looked back over less than a decade, to rulings in which the Fourteenth Amendment had been construed to make the prohibitions of the First Amendment applicable to state action abridging religion.[12] The Court stated that since that tribunal had accepted the broad meaning given the First Amendment in those cases decided by the light of the freedom of religion clause, there was every reason to give the same broad application and construction to the establishment of religion clause of the same Amendment.[13] This was stated in *Everson v. Board of Education* of *Ewing Township*,[14] decided February 10, 1947. This

12 Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); Jamison v. Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1943); Largent v. Texas, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1943); Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943); W. Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); Follett v. Town of McCormick, 321 U. S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944); Marsh v. Alabama, 327 U. S. 501, 66 S. Ct. 276 (1946).

13 "It is in the repetition of this unjustifiable blanketing of the first ten amendments into the fourteenth that in my opinion the Court made its chief error in the Bus case," states Dr. Clarence Manion. "Ten years ago this case would have been tossed out of the Supreme Court for lack of jurisdiction for the reason that 'whether or not New Jersey wished to establish a religion outright and by law was a matter exclusively within the province of the State of New Jersey as limited by the Bill of Rights in the New Jersey State Constitution. This explains what you read some years ago that 'the Federal Constitution prevents Congress from enacting laws that would be helpful or prejudicial to any particular religious denomination, but does not prevent the State Legislature from enacting such laws.'"

14 67 S. Ct. 510. This was an appeal from the Court of Errors and Appeals of the State of New Jersey. Certiorari proceedings by Arch R. Everson to set aside a resolution of the Ewing Township board of education were advanced. This resolution, challenged, provided for transportation of pupils in public and parochial schools. A New Jersey statute authorized its school districts to make rules and contracts for the transportation of children to and from school. The appellee, a township board of education, in acting pursuant to this statute, authorized reimbursement to parents of money expended by them for bus transportation of their children on the regular buses operated by the public transportation system. Part of this money was for payment of transportation of some children in the community to Catholic parochial schools, which give their students both secular and religious instruction; the religious teaching conforming to the tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest. In his capacity as a district taxpayer, the appellant filed suit in a state court, challenging the right of the Board to reimburse parents of parochial school students. He contended that both the statute and the resolution in question violated both the state and the federal constitutions. A judgment setting aside the resolution (132 N. J. L. 98, ...A. 2d 75) was reversed by the State Court of Errors and Appeals (133 N. J. L. 350, 44 A. 2d 333), and the petitioner appealed [28 U. S. C. A. Sec. 344 (a), 28 U. S. C. Sec. 34 (a)], bringing up the suit into the Supreme Court of the United States.

case involved the free bus transportation issue, a taxpayer of New Jersey contending that a New Jersey law amounted to a contribution of public funds in support of a religious establishment.[15] This suit gave rise to the old question of separation of Church and State.

Declaring the New Jersey law constitutional, the Court stated that striking down a state law is not a matter of such light moment that it should be done by a federal court *ex mero motu* on a postulate neither charged nor proved, but which rests on nothing but a possibility; that the authority of the Supreme Court to strike down statutes on the ground that the purpose for which the tax-raised funds were to be expended was not a public one, must be exercised with great caution; that the fact that a state law, passed to satisfy a public need coincides with the personal desire of the in-

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15 In the *Everson* case, the Court reviewed briefly the history of State and Church in the English colonies of North America: "The very charters granted by the English Crown to individuals and companies . . . authorized these to erect religious establishments, which all, 'whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by . . . persecutions. Catholics found themselves hounded and prosecuted because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestants . . . And all these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters . . .

In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some church schools have either sought or accepted state financial aid for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited by any particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show all the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion . . . ."

Denial of free bus transportation to children attending private schools appears to be based on the contention that the use of public money for such purposes would tend to endanger the so-called traditional American theory and practice of separation of Church and State. Then again it is asserted, that such transportation violates many of the state constitutions, which prohibit the giving of aid to any religious sect or denomination. Although the greater number of the states deny by constitutional provision such aid, a number of these allow such transportation to pupils of private schools even though their laws deny such aid.

dividuals most directly affected, is an inadequate reason for the Supreme Court to say that a legislature has erroneously appraised the public need. Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent in a way which furthers a public program.

Tending toward the pronouncement of decision in the *Everson* case the Court said: [16]

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16 This reasoning of the Court approaches the true concept of the separation of Church and State. This true concept is consummately set forth by John Courtney, S. J., in AMERICA, February 15, 1947:

". . . Before one can know whether public aid to parochial schools is the entering wedge in the wall of separation of Church and State, one must know where this wall is and what it walls off from what . . . There is a constitutional 'wall' between state authority and the religious conscience. There is also a wall between state authority and the parental conscience; it was constitutionally affirmed in the famous Oregon School case, in which the Court denied to the state the right to force parents to send their children to public schools. In general, there is a wall between the areas ruled respectively (and exclusively) by civil authority and religious authority. But the metaphor must not be pressed too far. The Supreme Court of Mississippi (in Chance v. Mississippi . . .) well said: 'Useful citizenship is a product and servant of both Church and State, and the citizen's freedom must include the right to acknowledge the rights and benefits of each . . . Indeed, the State has made historical acknowledgment and daily legislative admission of a mutual dependence, one upon the other. It is the control of one over the other that our Constitution forbids.'

"Good citizenship and general welfare are complex but undivided entities; to them both Church and State, remaining 'separate,' make their respective contributions, each freely admitting and encouraging the contribution of the other. Whatever deformations may have been introduced into individual minds by secularist or religious prejudice, this is historically and constitutionally the genuine spirit of the American principle of separation of Church and State. What canons of interpretation have we? I suggest three. *First,* the principle of separation of Church and State seeks to insure the general welfare . . . and to guarantee to Church and State — and parents under the guidance of religious conviction — full freedom for the discharge of their respective responsibilities. Consequently, this principle may not be so applied in the field of education as to result in damage to the general welfare, or in the unreasonable limitation of either state sovereignty or religious and parental rights. *Secondly,* the general welfare of the United States has as an essential component the maintenance of the free American system of education. By this I mean the coexistence and free functioning of two types of schools — the non-profit, tax-exempt, church-related school . . . and the public school . . . *Thirdly,* one must take seriously the doctrine of the State as *parens patriae, i.e.,* as the supreme sovereignty whose power must always be exercised with particular tenderness towards those of its citizens who are under disability, especially the disability of childhood helplessness . . . Moreover, one must realize that the State is primarily 'parent' of children, not of schools . . . Certainly from the standpoint of the Federal Constitution, the American state is not interested in whether a child attends a public or a parochial school . . . But the American State is in-

"New Jersey cannot consistently with the establishment of religion clause of the First Amendment contribute funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently it cannot exclude individual members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children that are attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief . . . The First Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them . . . The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."

Sister Mary Barbara McCarthy, S.S.J.

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terested in its children who are equally its wards and are equally its citizens . . . It must take a strict account of what kind of *patria* it is 'parent' of; namely, of a nation of mixed religions and of free two-component educational system. It must therefore so frame and administer its legislation, based on the *parens patriae,* as to see that all its benefits flow equally to all children, regardless of their religion and . . . particular type of education they want in consequence of their religion. . . ."