Vanderbilt Law Review

Volume 4
Issue 3 *Issue 3 - A Symposium on Current Constitutional Problems*

Article 10

4-1951

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STATE CONSTITUTIONS, STATE COURTS AND FIRST AMENDMENT FREEDOMS

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We have recently been reminded that one of the current and recurrent quandaries of the Supreme Court of the United States arises from the American constitutional system's counterpart of the philosophical problem of the One and the Many.[1] When an individual's freedom is involved, the question is whether and to what degree state legislators, public officials and judicial officers shall be called upon to enforce standards of respect for personal liberties defined by the Federal Constitution and the United States Supreme Court; or, put another way, how far the first eight amendments of the Federal Constitution are incorporated into the Fourteenth (the latter is, of course, binding upon state action). In 1947, the Court by a majority of a single vote refused to take the doctrinal position that the entire Federal Bill of Rights is binding upon the states.[2] Today, with the replacement of Justices Rutledge and Murphy by Justices Clark and Minton, the Court seems even more firmly committed to the position that only certain of the first eight amendments apply to the states—those which are "fundamental," those which are "of the very essence of a scheme of ordered liberty." Undeniably included among these fundamental provisions are the prohibitions of the First Amendment.

State court decisions and state constitutional materials are too frequently ignored by both commentator and counsel when civil liberties questions arise.[3] State constitutions furnish extensive and sometimes unique materials which can help in the protection of human liberties and state courts provide the forums in which a very great number of civil liberties cases are decided. Thus, even when the argument for protection rests on Fourteenth Amendmnt grounds, the lower state courts and state supreme courts are in a strategic position to serve freedom of expression effectively. A case which stands for freedom in the state supreme court need be taken no further for the vindication of our deepest value. Indeed it is insurance that an aspect of democracy will not lose vitality because of exposure to the "silent treatment": a denial of certiorari by the Supreme Court of the United States.[4] State constitutional materials are particularly important on issues of Church-State separation.

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1. FREUND, ON UNDERSTANDING THE SUPREME COURT 7 (1950).
2. Adamson v. California, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947).
3. For a survey of state constitutional cases upsetting state economic regulatory legislation, see Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); see also Paulsen, *"Natural Rights"—A Constitutional Doctrine in Indiana*, 25 IND. L.J. 123 (1950).
4. *Cf.* Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term —An Appraisal of Certiorari*, 99 U. OF PA. L. REV. 293 (1950).

The overwhelming number of American cases involving the separation of Church and State have been decided under state constitutions.

This paper will examine some of the legal resources contained in state constitutions and will inquire how successfully state courts have protected the liberties of the people. The materials on which this paper is based are: (1) state constitutional provisions themselves, (2) recent state court opinions deciding freedom of expression questions arising wholly or in part under the Fourteenth Amendment as it incorporates the First as well as similar questions arising under state constitutions,[5] and (3) leading state cases dealing with separation of Church and State.

INTRODUCTION

Some obvious points should be set at rest at the outset about the relationship between the "First Amendment Freedoms" applicable to the states by way of the Fourteenth Amendment and similar freedoms guaranteed by the constitutions of the states. State courts still may interpret their state constitutions to protect civil liberties more widely than the Federal Constitution requires. For example, the Federal Constitution was not violated when a municipality forbade "loud and raucous" sound trucks to operate on city streets.[6] The freedom of expression guaranteed by the First Amendment, as read through the eyes of a majority of the Supreme Court of the United States, did not extend to this particular means of expressing ideas. However, a state constitutional guarantee of free expression can very well be understood as insisting that the public endure this noise in order that society may have the benefit of ideas from as many channels as possible.[7] Again, although in 1940 a school board did not violate the freedom of religion clause of the First Amendment when it required all children to perform the flag salute as a condition of attending a public school,[8] a state supreme court, reading its state constitutional provisions for religious freedom, could very well anticipate the Supreme Court's subsequent reversal of its former stand.[9] Of course state courts do not always ignore the interpretation by the Federal Supreme Court of a constitutional guaranty. Many states will follow the analogous federal cases in construing their similar state provisions. Indeed, to

5. The labor cases involving civil liberties and the coercive tactics of unions have been omitted. The cases studied include those of 1946-50.

6. Kovacs v. Cooper, 336 U.S. 77, 69 Sup. Ct. 448, 93 L. Ed. 513 (1949).

7. In the New Jersey Court of Errors and Appeals four judges held the ordinance in question in the *Kovacs* case a violation of the state as well as the federal constitution. Kovacs v. Cooper, 135 N.J.L. 584, 52 A.2d 806 (1947).

8. Minersville School Dist. v. Gobitis, 310 U.S. 586, 60 Sup. Ct. 1010, 84 L. Ed. 1375 (1940).

9. See Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823 (1944); *cf.* Gabrielli v. Knickerbocker, 12 Cal.2d 85, 82 P.2d 391 (1938); People v. Barber, 289 N.Y. 378, 46 N.E.2d 329 (1943). The original flag salute case was reversed in West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943).

follow similar federal cases in the absence of cogent reasons for departing therefrom has become in some states a doctrine of state constitutional construction.[10]

FREEDOM OF EXPRESSION

The First Amendment to the Federal Constitution is more simply phrased than the analogous state constitutional provisions. Amendment I simply declares "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 redress of grievances."

Typical state phrasings of the free speech and press guarantees may be found by considering the constitutions of Illinois, Utah and Oregon. Article II, section 4 of the Illinois Constitution provides:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

The Utah Constitution in Article I, section 15, more nearly follows the federal example:

> "No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

The Oregon Constitution contains a kind of combination of the Utah and Illinois expressions:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."[11]

The state guarantees of petition and assembly are usually found in constitutional provisions separate from those on free speech and press. Various state constitutions not only guarantee freedom of worship but also specifically prohibit a religious test for holding public office,[12] for the competency of witnesses,[13] for voting,[14] for study or teaching in the public schools,[15] for the

10. *E.g.*, City of Portland v. Thornton, 174 Ore. 508, 149 P.2d 972 (1944).
11. ORE. CONST. Art. I, § 8.
12. *E.g.*, ARK. CONST. Art. II, § 26; WYO. CONST. Art. I, § 18. In contrast, a few constitutions require public officers to believe in a "Supreme Being." *E.g.*, S.C. CONST. Art. XVII, § 4.
13. *E.g.*, FLA. CONST. Decl. of Rights, § 5; N.Y. CONST. Art. I, § 3.
14. *E.g.*, KAN. CONST. Bill of Rights, § 7; UTAH CONST. Art. I, § 4.
15. *E.g.*, NEB. CONST. Art. VII, § 11; N.M. CONST. Art. XII, § 9.

enjoyment of "any civil or political right, privilege or capacity."[16] Some constitutions provide exemption from service in the militia for those whose religious convictions do not permit the bearing of arms.[17] In the cases discussed below those involving freedom of worship have been treated along with those of free press and free speech.

The extent of freedom of speech has seldom turned upon the peculiar way in which a state constitution has phrased its free speech provision. However, provisions like that of Illinois which contain a reminder that a speaker is responsible for the abuse of his liberty have occasionally been referred to in libel cases. Recently in California a litigant took the position that the constitutional phrase referring to penalties for abuse of speech had the effect of constitutionally freezing the law of libel as of the date of California's Constitution.[18] Therefore, the litigant argued, a statute which cut down a newspaper's common law liability for libel was unconstitutional. Needless to say, the contention failed. In Missouri's new Constitution of 1945, more than a narrow conception of freedom of speech and press was intended, when the following italicized portion of Article I, section 8, of the Missouri Constitution was added: ". . . no law shall be passed impairing the freedom of speech, *no matter by what means communicated;* . . . every person shall be free to say, write, or publish, or *otherwise communicate* whatever he will on any subject. . . ." (Italics added.) The constitutional right of expression in Missouri would not seem to be altered merely by a new technology which provides a means of communication unknown to the constitution makers.[19]

The Utah provision concerning freedom of speech is typical of many other states in setting out that in prosecutions or suits for libel truth shall be given in evidence to the juries and shall be a defense if the matter was published with good motives and that the jury shall have the right to determine both the law and the fact in a libel suit. The reason for this provision can be understood by a reference to English experience which culminated in Fox's Libel Act of 1792. This Act, which allotted to the jury in a criminal trial for libel the task of deciding whether the words were defamatory, was passed because the judges had twisted the prosecutions for libel into methods of obtaining a conviction of political offenders.[20] Such prosecutions today would probably violate the First Amendment, but the constitutions of some states nevertheless provide the additional protection of jury determination of the entire question.

16. *E.g.*, ILL. CONST. Art. II, § 3; *cf.* W. VA. CONST. Art. III, § 15.
17. *E.g.*, KAN. CONST. Art. 8, § 1; WYO. CONST. Art. XVII, § 1.
18. See Werner v. Southern Calif. Assoc. Newspapers, 35 Cal.2d 121, 216 P.2d 825 (1950); see also Ross v. Gore, 48 So.2d 412 (Fla. 1950).
19. *Cf.* Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 35 Sup. Ct. 387, 59 L. Ed. 552 (1915), in which the United States Supreme Court held that movies were not protected from censorship by the state constitution of Ohio.
20. WINFIELD, TORTS § 78 (4th ed. 1948).

Of the reported state court decisions involving freedom of expression most of the recent cases have dealt with the constitutional questions under both the state constitution and the Fourteenth Amendment. An unusual exception arose in Massachusetts. Thomas W. Bowe applied for a mandate to prevent the submission of a proposed initiative law which would make political contributions by labor unions illegal. Amendment 48 of the Massachusetts Constitution which provides for the initiative also forbids submitting to the people any proposed initiative inconsistent with the rights of freedom of speech, press, election and assembly set forth in the Massachusetts Declaration of Rights. In the light of this provision the Massachusetts Supreme Judicial Court granted the mandate because it felt the proposed initiative would violate Article 16 (freedom of the press) and Article 19 (the guarantee of freedom to assemble and to consult upon the common good), thereby depriving unions of substantial and important political rights.[21] To be effective, political action as a matter of group organization involved the right to print, to circulate views, to appear in public assemblies and to broadcast over the radio. All this costs money, and if defined groups could not use money for these purposes their essential freedoms were contracted to the vanishing point. Organized labor could not get its message to the electorate; its rights of freedom of the press and freedom to assemble would be crippled.

State courts have not always been so sensible of the requisites for effective political organization and the dissemination of political views. Admittedly a sound truck disturbs the peace and quiet of the community. Yet a candidate with a limited budget and without substantial newspaper support may have no other way to get his views before the electorate. Since the Supreme Court of the United States sustained the municipal ban by Trenton, New Jersey on "loud and raucous noises" emitting from loud speakers and sound amplifiers,[22] both Florida[23] and Pennsylvania[24] have upheld what seem to be absolute prohibitions of any sound making devices, at least when used at a busy thoroughfare in the heart of a city's business district. Both of these state cases demonstrate an eagerness to read the Supreme Court case as permitting any sound truck curb and to recognize the broadest municipal powers. When, to be constitutionally protected at all, a sound truck must speak softly and, at that, only in thinly occupied areas, an inexpensive channel of propaganda dissemination is almost completely obstructed.

Toleration of speakers with manners and views obnoxious to listeners has been a recent issue for state courts and in only one instance have the orators of doubtful taste prevailed against peace officers. In Colorado on

21. Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E.2d 115, 167 A.L.R. 1447 (1946).
22. Kovacs v. Cooper, 336 U.S. 77, 69 Sup. Ct. 488, 93 L. Ed. 53 (1949).
23. State *ex rel.* Nicholas v. Headley, 48 So.2d (Fla. 1950).
24. Commonwealth v. Geuss, 76 A.2d 500 (Pa. Super. 1950).

the evening of December 21, 1948, a group of people, 50 to 75 in number, assembled in front of the governor's residence. Milling about, they chanted, "Governor Knous come out of the house" and "the death of Ruben Garcia is on your shoulders," "stop beating the boys." The chanting, like a football cheer, was high pitched and could be heard at least two blocks away. Nevertheless the Supreme Court of Colorado reversed the leaders' conviction for breach of the peace, holding that the crowd was merely carrying out the right peaceably to assemble and to petition the government for redress of grievances.[25] In three other cases of allegedly disorderly speech, the state courts, concerned with the possibility of violence on the part of those exhorted by the speaker, denied constitutional protection to the speaker.[26] Two of these decisions[27] were reversed by the United States Supreme Court, but the third was upheld.[28] In that case the defendant, a student at Syracuse University, addressed a crowd of eighty persons on the city streets. The group, consisting of both white and colored people, heard the defendant call the mayor of Syracuse "a champagne sipping bum" and the American Legion a "Nazi Gestapo agency." Although some angry muttering occurred throughout the crowd, there was no disorder. Two police officers were present at the scene. The defendant, continuing, said that Negroes did not have equal rights and should rise up in arms to fight for them. One of the officers present gained the impression that the defendant was trying to arouse the Negroes against the whites. A member of the crowd approached the officer and said that if the police did not act to stop the speaker, the listeners would do it in their stead. At this point one of the officers asked the defendant to stop speaking, which he refused to do. His arrest followed immediately. In upholding this conviction the Supreme Court of the United States was concerned with the extent of federal protection of the freedom of speech. Nevertheless, it should be repeated, the state court could have adopted the constitutional position taken by the three dissenting justices of the Supreme Court.

When courts are moved to silence speakers because of the possibility of group violence, an open invitation is extended to the professional meeting breaker and rowdy. The only practical way to give the greatest freedom of speech is to protect the speaker and insist that the officials of the community provide adequate police protection where that is conceivably possible.

Recently state courts have also had to determine whether speaking and meeting in public parks or distributing literature on the public street can be

25. Flores v. City and County of Denver, 220 P.2d. 373 (Colo. 1950).

26. Chicago v. Terminiello, 400 Ill. 23, 79 N.E.2d 39 (1948); People v. Kunz, 300 N.Y. 273, 90 N.E.2d 455 (1949); People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950); *cf.* Loomis v. City of Atlanta, 82 Ga. App. 346, 60 S.E.2d 397 (1950).

27. Terminiello v. Chicago, 337 U.S. 1, 69 Sup. Ct. 894, 93 L. Ed. 1131 (1949); Kunz v. New York, 340 U.S. 290, 71 Sup. Ct. 312 (1951).

28. Feiner v. New York, 340 U.S. 315, 71 Sup. Ct. 303 (1951).

forbidden or confined by a license requirement of a state or municipal organization. The states have followed, sometimes reluctantly,[29] the authoritative decisions of the Supreme Court of the United States. Licensing arrangements have been invalidated where they place complete discretion to grant permits in the hands of a local police official, or when they make censorship possible by allowing permits to be denied for reasons other than traffic control or the fair sharing of public park facilities.[30] The New York Court of Appeals has introduced the doctrine that even though no standard for the issuance of permits exists in the ordinance itself, where long administrative practice has granted permits to all who apply, the ordinance will be construed as restricting official discretion so that only constitutional conditions may be attached to the issuance of permits.[31]

In two cases state supreme courts may have limited legislative power beyond the requirements of the Federal Constitution. The Virginia Supreme Court reversed, on both state and federal grounds, the conviction of a magazine subscription salesman for selling subscriptions in public without a municipally required permit from the Director of Public Safety.[32] The salesman was employed by the National Publishing Company, the publisher of

29. In speaking of some federal cases, a New Jersey judge lamented, "I am unable, sitting here as a single justice, to overrule the court's decisions to which I have referred. . . ." Evans v. Lepore, 59 A.2d 385, 386 (N.J. 1948). The Massachusetts Supreme Court has recently written: "Within the field now occupied by decisions of the Supreme Court of the United States it would be merely academic and futile for us to inquire in every instance whether in construing the Constitution of this Commonwealth we would go as far as that court has gone in construing the Constitution of the United States." Commonwealth v. Gilfedder, 321 Mass. 335, 73 N.E.2d 241, 245 (1947).

30. People v. Duffy, 79 Cal. App.2d 875, 179 P.2d 876 (1947); New Orleans v. Hood, 212 La. 485, 32 So.2d 899 (1947); Commonwealth v. Gilfedder, 321 Mass. 335, 73 N.E.2d 241 (1947); Kenyon v. Chicopee, 320 Mass. 528, 70 N.E.2d 241, 175 A.L.R. 430 (1946); People v. Ciocarian, 317 Mich. 349, 26 N.W.2d 404 (1946); Evans v. Lepore, 59 A.2d 385 (N.J. 1948); State v. Guillotte, 77 A.2d 65 (N.J. Co. Ct. 1950); see also cases in note 31 *infra*. The Wisconsin Supreme Court upset a Milwaukee County ordinance forbidding religious services in the park even though it was argued that to permit the services was an unconstitutional aid to religion. Milwaukee County v. Carter, 45 N.W.2d 90 (Wis. 1950).

By asserting that the jury was judge of both law and fact in Maryland, the Maryland Supreme Court refused to review a trial court's conviction of a Jehovah's Witness for speaking in the public parks without permission. Niemotko v. State, 71 A.2d 9 (Md. 1950). The opportunity for the Witnesses to speak was insured only after a successful appeal to the United States Supreme Court. Niemotko v. Maryland, 340 U.S. 268, 71 Sup. Ct. 325 (1951). United Artists Corp. v. Board of Censors, 189 Tenn. 397, 225 S.W.2d 550 (1949), is another case denying freedom of expression on narrow local procedural grounds.

Members of the Jehovah's Witnesses have unsuccessfully asserted a right to enter apartments or rooming houses against the wishes of the owner. Fort Scott v. Arbuckle, 164 Kan. 49, 187 P.2d 348 (1947); Watchtower Bible & Tract Soc. v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948). Advertising handbills can be constitutionally banned. People v. Uffindell, 90 Cal. App.2d 881, 202 P.2d 874 (1949).

31. People v. Nahman, 298 N.Y. 95, 81 N.E.2d 36 (1948); People v. Hass, 299 N.Y. 190, 86 N.E.2d 169 (1949); *cf.* People v. Kunz, 300 N.Y. 273, 90 N.E.2d 455 (1949); Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8 (1946).

32. Robert v. Norfolk, 188 Va. 413, 49 S.E.2d 697 (1948); *cf. Ex parte* Mares, 75 Cal. App.2d 798, 171 P.2d 762 (1946); Slater v. Salt Lake City, 206 P.2d 153 (Utah 1949).

Sports Digest, Fashion Parade, My Lady and several trade journals. The Virginia court construed the free press guarantee to include solicitation of subscriptions because solicitation is merely the first step in the whole process of circulation and publication. Although the opinion relied largely on federal materials, the court noted that the Virginia Constitution's free speech article which states, "Any citizen may freely speak, write, and publish his sentiments on all subjects," was broader than the First Amendment. In South Dakota, the state court held that Jehovah's Witnesses could not be compelled to pay a sales tax on the sale of their literature.[33] The court considered binding the federal case, *Murdock v. Pennsylvania,*[34] which invalidated a city's nondiscriminatory license fee imposed on Jehovah's Witnesses who sold literature of their sect on the city streets. In an analogous case, California imposed a personal property tax on pamphlets, books and other literature stored and used by the Jehovah's Witnesses.[35] In distinguishing *Murdock,* the California court saw a difference between a license tax which applies to the activity itself and a nondiscriminatory tax on property used or employed in connection with the activity.

State and federal guarantees of the free exercise of religion have created problems for state courts when a religionist's choice of action runs counter to legislative enactments in the public interest. In two instances, legislative acts prohibiting solicitation to perform a marriage were upheld.[36] A state's power to deny unemployment compensation has been affirmed where the applicant could not present himself for work on Saturday, a day which his religious convictions required him to observe as a day of meditation and rest.[37] Mohammedan parents have been convicted of violating the compulsory attendance laws of the Pennsylvania school code because they persistently refused to send their children to school on Friday, the sacred day of the Mohammedans.[38] Virginia compulsory school laws were violated when parents, on the ground of religious belief, claimed the right of sole instruction of their children.[39] A state can compel vaccination of children in spite of the parents' contrary religious beliefs.[40] Three cases have upheld criminal convictions imposed upon the leaders of a religious group which displays and

33. State v. Van Daalan, 69 S.D. 466, 11 N.W.2d 523 (1943). In Tampa Times Co. v. Tampa, 158 Fla. 589, 29 So.2d 368 (1947), *appeal dismissed,* 332 U.S. 749 (1947), the Florida Supreme Court upheld, although applied to newspapers, a nondiscriminatory annual retail and wholesale license tax.

34. 319 U.S. 105, 63 Sup. Ct. 870, 87 L. Ed. 1292 (1943).

35. Watchtower Bible & Tract Soc. v. Los Angeles County, 30 Cal.2d 426, 182 P.2d 178 (1947).

36. Ladd v. Commonwealth, 233 S.W.2d 517 (Ky. 1950); Hopkins v. State, 69 A.2d 456 (Md. 1949).

37. Kut v. Albers Super Markets, 146 Ohio St. 522, 66 N.E.2d 643 (1946).

38. Commonwealth v. Bey, 70 A.2d 693 (Pa. Super. 1950).

39. Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948).

40. Mosier v. Barren County Board of Health, 308 Ky. 829, 215 S.W.2d 967 (1948).

handles poisonous snakes in the course of its religious ceremony.[41] A conviction of members of a Mormon sect for unlawful conspiracy to advocate, teach and counsel the practice of polygamy was affirmed in Utah,[42] and in California a city's zoning ordinance was upheld although it excluded a Mormon church from a residential area.[43]

Newspapers and radio stations have infrequently engaged in state litigation to vindicate the freedom of the press. One case arose in Illinois when Montgomery Ward sought an injunction to restrain a union from sowing distrust among the customers and employees of Ward's through the union's official publication, "The Retail and Wholesale Department Store Employee."[44] The magazine allegedly had made untrue assertions about the prices charged on merchandise, employees' benefits, etc. The Illinois appellate court refused to grant an injunction on the ground that a court cannot constitutionally censor in advance of publication. Three cases, two involving newspapers and one involving a radio station, have attempted to reconcile the requirement of fair trial with the uncertain value of free newspaper commentary on a trial in progress. The Wisconsin Supreme Court has held constitutional a Wisconsin statute which made it a crime to publish the identity of a female allegedly raped or subjected to a criminal assault.[45] There is merit in the court's assertion that the small benefit to society of knowing the identity of the unfortunate girl is outweighed by the value of concealment to her and her family. But the assertion that "Whether there is a 'clear and present danger' warranting the enactment of the statute is for the legislature,"[46] is an unwarranted abdication of a state supreme court's role in protecting personal liberty. In Mississippi the supreme court reversed the conviction of a newspaper woman for contempt of court.[47] She had interviewed a witness whom the judge had charged to talk only with counsel. The supreme court disclaimed any general right of a trial court to deny the press opportunity to learn and publish legitimate facts of a trial in progress. In Baltimore several radio stations were held in contempt of court for broadcasting a story concerning an alleged confession made to the police by a defendant in a pending criminal case. The Maryland Supreme Court, relying wholly on the Fourteenth Amendment, decided the broadcast had not deprived the defendant

41. State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948), 2 VAND. L. REV. 694 (1949); Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947).

42. State v. Musser, 110 Utah 534, 175 P.2d 724 (1946).

43. Corporation of Presiding Bishop v. City of Porterville, 90 Cal. App.2d 656, 203 P.2d. 823 (1949).

44. Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees, 330 Ill. App. 49, 70 N.E.2d 75 (1946).

45. State v. Evjue, 253 Wis. 146, 33 N.W.2d 305 (1948).

46. 33 N.W.2d at 311.

47. Brannon v. State, 202 Miss. 571, 29 So.2d 916 (1947).

of a fair trial nor had it created a clear and present danger of a denial of a fair trial.[48]

Perhaps the most difficult application of free speech concepts for today's state courts arises from the world tensions which have enhanced the fear of the disciplined ranks of the Communist party and its wellknown devotion to the interests of the Soviet Union. A new wave of state and municipal legislation, designed to curb Communist subversive activity, has swept over many parts of the country. Some of these enactments threaten the liberty of everyone but the most orthodox. In these challenges to "First Amendment Freedoms," the initial analysis of federal constitutional protection as well as that afforded by state documents, comes from the state courts.

To identify the loyal and to dismiss the disloyal seems increasingly important to state and municipal legislators when the persons involved are either public officials or public employees, especially members of the teaching profession. A New Jersey act requires an oath of the governor, of state officers, of all persons required by law to give assurance of loyalty to the government of the state (including lawyers when admitted to the bar) and of all candidates for nomination or election to any public office. The oath, as can be seen from the italicized portions, is extraordinarily broad.

> ". . . I do not *believe in,* advocate or advise the use of force, or violence, *or other unlawful* or unconstitutional means, to overthrow or *make any change* in the Government established in the United States or in this State; and that I am not a member of or *affiliated with* any organization, association, party, group or combination of persons, which *approves,* advocates, advises or practices the use of force, or violence, or *other unlawful* or unconstitutional means, to overthrow or *make any change* in either of the Governments so established. . . ."[49]

In 1949 nominees of the Progressive Party for governor and for membership in the state legislature sought to restrain the Secretary of State and several county clerks from printing "refused oath of allegiance" under their names on the general election ballot, and also asked a general injunction against enforcing the loyalty oath statute. In holding the challenged legislation unconstitutional in so far as it applied to the governor, to members of the legislature and to candidates for those offices, the opinion of the New Jersey Supreme Court demonstrates the protection which state constitutions can afford, when considered a bulwark of civil liberties.[50] The New Jersey Con-

48. Baltimore Radio Show v. State, 67 A.2d 497, 67 A.L.R.2d 497 (Md. 1949), *cert. denied,* 338 U.S. 912, 70 Sup. Ct. 252, 94 L. Ed. 562 (1950) (separate opinion by Frankfurter, J.).

49. N.J. STAT. ANN. § 41:1-3 (Supp. 1950) (italics added).

50. Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352, 3 VAND. L. REV. 811 (1950). In Nevada, university professors and school teachers may be able to take advantage of the *Imbrie* case without the burden of placing themselves in the category of "public officers." Art. XI, § 5 of the Nevada Constitution especially prescribes an oath of allegiance and office for them.

stitution prescribes the oaths of office for legislators and state officers and the court asked whether, "these oaths . . . [were] exclusive as to the members of the Legislature and State officers and therefore beyond the power of the Legislature to add to, subtract from, or in anywise vary?"[51] To give a negative answer would empower the legislature to impose qualifications for public office in addition to those prescribed in the Constitution, and accordingly, the statute was invalidated. Although the decision is placed on a narrow technical ground, Chief Justice Vanderbilt demonstrates an understanding of what he called the "danger, both religious and political"[52] of legislative oaths. The opinion contains a detailed history of the use of parliamentary religious oaths in England from Elizabethan times until the middle of the 19th century. During that period English legislators were required to swear that the sovereign was the supreme spiritual head of the realm; and that the declarant did not believe in transubstantiation, in the invocation of saints or in the sacrifice of the mass. Although Chief Justice Vanderbilt's opinion refers to English experience, political repressions by means of oaths have occurred in the United States. After the Civil War ex-Confederates frequently found themselves barred from public employment or even from the professions because of inability to execute an oath of present and past loyalty to the United States. A provision of the West Virginia Constitution (adopted in 1872) is one state's reaction to the problem:

> "Political tests, requiring persons, as a prerequisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths, of past alleged offences, are repugnant to the principles of free government, and are cruel and oppressive. No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment."[53]

The foregoing considerations were rejected when the Court of Appeals of Maryland expressly refused to follow the lead of the New Jersey case and upheld Maryland's antisubversive law, popularly called the Ober Act.[54] That Act provides, "No person shall become a candidate for election . . . to any public office . . . unless he . . . shall file . . . an affidavit that he . . . is not a subversive person. . . ." A subversive person is defined as anyone who

51. Imbrie v. Marsh, 71 A.2d at 356.

52. *Id.* at 358.

53. W. VA. CONST. Art. III, § 11. The Arizona Constitution provides: ". . . no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil. . . ." Art. XI, § 7.

In their attempt to regain their positions by court action, those California university professors who were dismissed for failure to take an anti-Communist oath rely partly on a portion of Art. IX, § 9 of the California Constitution which provides: "The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs." Petitioners' Reply Brief p. 6, Tolman v. Underhill, No. 7946, pending in the District Court of Appeal, 3d Dist. (1950).

54. Shub v. Simpson, 76 A.2d 332 (Md. 1950), upholding Md. Acts 1949, c.86.

commits or advises any person to commit any act intended to overthrow or assist in the overthrow or *alteration* of the constitutional form of the government by "revolution, force or violence," or any person who is a member of a subversive organization or of a foreign subversive organization. Further, a foreign subversive organization is defined as one controlled, directed or dominated directly or indirectly by a foreign power whose purpose is to advocate the overthrow, destruction or *alteration* of the American government and to establish in its place a form of government directed and controlled by a foreign power. The validity of this statute was raised when the Maryland court was asked whether the Secretary of State should accept the nomination of the Progressive Party's candidates for governor and for Congress in one of the Maryland districts although they had not executed the required oath. The Maryland Progressives seemed to have a stronger case in Maryland than had their New Jersey brothers because, in contrast to the New Jersey Constitution, Article 37 of the Maryland Declaration of Rights provides "nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." This apparent advantage was illusory. A majority of the Maryland court avoided the difficulties which Article 37 presented by considering the requirement not an oath of office but only an affidavit insuring the qualifications of the candidate to hold the office he sought. Once the oaths were so characterized, the Maryland court could easily uphold the statute as applied to state offices, because a 1948 amendment to the Maryland Constitution had prohibited office holding by a member of any organization which advocates the overthrow of the government by force or violence.[55] Therefore, in Maryland, a subversive could not hold office.

The Progressives, however, maintained that the oath required by the Ober Act went beyond the scope of the constitutional amendment, particularly since the Act required an affirmation of nonmembership in foreign controlled organizations. Taking the oath, they argued, might not be possible for members of nonviolent foreign organizations which aimed at an orderly alteration of the American constitutional system. For example, the oath could not be taken by members of a foreign controlled labor organization seeking by constitutional amendment to change this government's character to correspond with Great Britain's labor government, if, in the attempt, Great Britain would gain some control over this country. The court met this contention by declaring it would read the statute in the light of the purposes for which it was passed; control of Maryland's segment of the world Communist movement. The New Jersey case was discussed at length but distinguished on two grounds: (1) New Jersey did not have a constitutional provision similar to Maryland's which forbids members of subversive organiza-

55. MD. CONST. Art. 15, § 11.

tions from holding public office, and (2) in the New Jersey oath the affiant swore he did not *believe in* the overthrow of the government by force. For these reasons the court sustained the act as it applied to the Progressive Party's candidate for governor. But with respect to the candidate for Congress, the act was held invalid since the state of Maryland had no power to prescribe qualifications for membership in Congress. "There is nothing in the United States Constitution which in terms prevents a member of Congress from being a subversive person who seeks to overthrow the government of the United States by force or violence."[56] The majority opinion, citing three federal cases, said the Ober Act did not abridge freedom of speech, press and assembly; nor was it unconstitutionally vague or a bill of attainder.[57] Two justices dissented on the state constitutional ground of whether the additional oath was constitutionally permissible.

The most recent state court opinion involving state control of subversives in government comes from the New York Court of Appeals, which upheld the Feinberg Law.[58] A 1939 statute barred the appointment to or continued employment in any state office or position of persons who became members of groups teaching or advocating the overthrow of government by force or unlawful means. Ten years later the legislature enacted the Feinberg Law, designed to prevent the dissemination of subversive propaganda among children in the public schools. It provided that the Board of Regents of New York should list organizations it considered subversive. Membership in any organization included on the list would constitute prima facie evidence of disqualification for appointment to or retention in any position in the public schools of the state. Three cases, started in the trial courts, were consolidated on appeal: one on behalf of the Communist party of the state of New York; one on behalf of persons presently or formerly employed in the public school system; and the third on behalf of Teachers Union, Local 555 of the United Public Workers. Each case asked to have the Feinberg Law declared unconstitutional. In upholding the statute, the court of appeals expressed great deference for the judgment of the legislature in weaving a new strand in the mesh by which applicants for teaching jobs are screened. The Feinberg Law did not unwarrantedly infringe on freedom of speech, assembly or association. The legislature had found a clear and present danger of an infiltration by members of subversive groups into the public schools. Given the legislature's findings and purpose, "we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school

56. 76 A.2d at 340.

57. *Id.* at 339-40. The bill of attainder argument is much too easily dismissed in these oath cases. See Wormuth, *On Bills of Attainder: A Non-Communist Manifesto,* 3 WEST. POL. Q. 52 (1950).

58. Thompson v. Wallin, 301 N.Y. 476, 95 N.E.2d 806 (1950).

system of the State."[59] The New York case at least recognized that "there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion."[60]

Power over employees, equaled only by that of the most inquisitorial of private employers, has been conferred on local governments in California.[61] The opinions in these cases are notable chiefly because (1) they approve the imposition of a very broad loyalty statement (in one case employees were required to state whether they had directly or indirectly supported 142 named organizations);[62] and (2) they lean heavily on the doctrine that while one has a right to be a member of organizations and to be politically active, one has no right to a government job.[63] The opinions argue that a private employer would be justified in inquiring into an employee's loyalty, and hence, the government may also do so. "[N]o one would think of claiming that a prospective member of the Benevolent and Protective Order of Elks was having his constitutional rights violated because such Order, before admitting a member, requires that he take an obligation to be loyal to the government of the United States of America."[64]

State required antisubversive oaths are being employed for purposes other than ferreting out disloyal public employees. The Alabama Supreme Court in an advisory opinion said that a state constitutional provision making a loyalty oath a qualification for voting would not violate the Fourteenth Amendment.[65] A 1949 Ohio statute requiring that a loyalty oath be attached to any claim for unemployment compensation has been challenged only in a trial court at this writing. The trial judge's opinion,[66] probably one of the twenty most hysterical judicial expressions in print,[67] rests on a doctrinal

59. 95 N.E.2d at 815.
60. *Id.* at 811.
61. Garner v. Board of Public Works, 220 P.2d 958 (Cal. App. 1950); Steiner v. Darby, 88 Cal. App.2d 481, 199 P.2d 429 (1948).
62. Steiner v. Darby, *supra* note 61.
63. The constitutionality of rules limiting the right of public employees to join labor unions has been upheld. Perez v. Board of Police Comm'rs, 78 Cal. App.2d 638, 178 P.2d 537 (1947); King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947); Springfield v. Clouse, 356, Mo. 1239, 206 S.W.2d 539 (1947); C.I.O. v. Dallas, 198 S.W.2d 143 (Tex. Civ. App. 1946). In the Missouri cases, Art. I, § 29, of the Missouri Constitution which recognizes the right to organize was held inapplicable to public servants. In the *King* case three judges in a separate concurring opinion implied the existence of some constitutional limit on the conditions which attach to a government job, saying that the majority opinion "seems to be so broad as to place unreasonable restrictions on the rights of members of the police department as citizens to meet and to join organizations, the purpose of which would not be inconsistent with proper police discipline or inimical to public welfare." 206 S.W.2d at 558.
64. Steiner v. Darby, 88 Cal. App.2d 481, 199 P.2d 429, 435 (1948).
65. Opinion of the Justices, 252 Ala. 351, 40 So.2d 849 (1949).
66. Dworken v. Collopy, 91 N.E.2d 564 (Ohio C.P. 1950).
67. Something of the flavor of this opinion should be recorded: "It is a well recognized fact that those who most vociferously appeal to all the constitutional and statutory provisions provided to safeguard human rights, are those who violate the laws and then seek immunity from punishment by every legal means which their ingenuity may contrive, and it would seem that those who are most insistent on the

foundation similar to the California cases previously discussed. A privilege can be granted on any terms which pleases the legislature. Unemployment compensation is a gratuity furnished by the state and can be conditioned upon the recipient's loyalty.

A California Supreme Court case stands alone among contemporary opinions.[68] It invalidated an oath requirement on the broad ground of repugnance to the constitutionally protected freedom of expression. The statute involved in that case created a "civic center" around every public school and provided that the school buildings should be available for public meetings and other civic affairs. The statute, however, denied the use of the school building to any individual, organization or group which advocated or had as an objective the overthrow of the government by force.

Members and officers of the San Diego Civil Liberties Committee wished to use a school building in San Diego to discuss civil liberty problems of the community. The Board of Education asked them to swear they did not advocate and were not affiliated with any organization which advocated the overthrow by force or violence of the present government of the United States or of any state. The Committee refused to execute the oath and brought a mandamus proceeding to compel the School Board to grant the use of the school auditorium. The stand of the Committee was approved by the California Supreme Court, which agreed that although the state was not obliged to make public school buildings available for public meetings, yet when it did so the buildings must be open to all. To prohibit subversive elements from exercising rights of free speech would offend the constitution. Consequently proof cannot be required that any person or group is nonsubversive. Justice Traynor proclaimed a liberal's understanding of the guarantees of freedom of speech:

> "The very purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who held them, but granting it to those whose convictions and affiliations happened to be acceptable and in effect amplifying their privilege by making it a special one. In the competitive struggle of ideas for acceptance they would have a great strategic advantage in making themselves known and heard in a forum where the competition had been diminished by censorship, and their very freedom would intensify the suppression of those condemned to silence. It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of democratic

exercise of their right of free speech are those who want to use that right to the detriment of others. . . . In these present parlous times one should be willing to stand up and be counted as a loyal citizen, and when anyone protests to be so counted, as being an infringement on his constitutional rights, he immediately draws suspicion upon himself and raises doubts as to his loyalty and his worthiness to enjoy those rights which he thus asserts." *Id.* at 571. Higher on the list of the "hysterical twenty" is the opinion of another Ohio trial court judge which upheld a loyalty oath required of teachers in the Cleveland schools. Dworken v. Cleveland Board of Education, 94 N.E.2d 18 (Ohio C.P. 1950).

68. Danskin v. San Diego Unified School Dist., 28 Cal.2d 536, 171 P.2d 885 (1946).

assembly would be stilled. And the dulling effects of censorship on a community are more to be feared than the quickening influence of a live interchange of ideas."[69]

Separation of Church and State

The American constitutional system not only guarantees freedom to worship without interference by government, but also embraces the notion that the government should not promote religious activity. Both state and federal constitutions clearly prohibit the setting up of any religion with the prerogatives of an established church. The First Amendment, as interpreted by the United States Supreme Court, requires the states to maintain "a wall of separation between church and State."[70] The idea behind this separation is not merely political, designed to minimize the divisive impact of religious controversy and the special privileges which could be given to religious groups. It is also a distinctly religious conception.[71] The Church, conceived of as a voluntary spiritual body held together by the hearts of men, lies behind the principle of separation. It gains its vitality from the voluntary adherence of its members and desires no state aid in the propagation of its point of view. It asks merely for the right to work by means of persuasion throughout the community. The state has no legitimate concern with religion, a wholly personal matter.

In maintaining the separation a wide range of problems arise. Can a state's money be appropriated when it contributes in part to the continuance of parochial schools? Can religious instruction be given in the schools? Can state expenditures be made to support charitable institutions controlled by religious groups? Can state officials lend their prestige to the promotion of religion and religious ceremonies? These questions have usually been disposed of under the provisions of state constitutions. In fact, in only one case has the United States Supreme Court ever invalidated a state's activities as infringing the constitutional principle of separation. *Illinois* ex rel. *McCollum v.*

69. *Id.* at 548, 171 P.2d at 893.

70. A phrase from Thomas Jefferson quoted in Reynolds v. United States, 98 U.S. 145, 164, 25 L. Ed. 244 (1879).

71. "The second principle, embodying the more purely religious view of the question, starts from the conception of the church as a spiritual body existing for spiritual purposes, and moving along spiritual paths. It is an assemblage of men who are united by their devotion to an unseen Being, their memory of a past divine life, their belief in the possibility of imitating that life, so far as human frailty allows, their hopes for an illimitable future. Compulsion of any kind is contrary to the nature of such a body, which lives by love and reverence, not by law. It desires no State help, feeling that its strength comes from above, and that its kingdom is not of this world. It does not seek for exclusive privileges, conceiving that these would not only create bitterness between itself and other religious bodies, but might attract persons who did not really share its sentiments, while corrupting the simplicity of those who are already its members. Least of all can it submit to be controlled by the State, for the State, in such a world as the present, means persons many or most of whom are alien to its beliefs and cold to its emotions. The conclusion follows that the church as a spiritual entity will be happiest and strongest when it is left absolutely to itself, not patronized by the civil power, not restrained by law except when and in so far as it may attempt to quit its proper sphere and intermeddle in secular affairs." 2 Bryce, The American Commonwealth 700 (3d ed. 1899).

Board of Education,[72] declared unconstitutional a scheme of religious instruction provided by religious leaders in public school buildings during regular school hours. Other federal cases have sustained against First and Fourteenth Amendment arguments, a federal appropriation to a hospital controlled by a church,[73] a state's donation of textbooks to students in parochial schools,[74] and a state's expenditure which reimbursed the parents of children attending a church school for sums they had paid to secure school bus transportation.[75]

A great variety of state constitutional provisions bear on the issue of Church-State separation. Utah, the commonwealth having the most recent experience with substantial church domination, has perhaps the broadest statement of the separation requirement:

> "The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution."[76]

Other constitutions, like that of Illinois provide: "No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."[77] Still others prohibit the appropriation of money or property for religious or sectarian purposes.[78] In some instances expenditures to religious or sectarian institutions are forbidden.[79] Oregon[80] and Michigan [81] expressly prohibit payment by the state for any religious services held in either house of the legislature.

Nearly every state constitution contains provisions expressly applicable to the relationship between religion and the public schools, the most frequently and bitterly litigated Church-State issue. Some constitutions forbid religious or sectarian instruction in the schools,[82] some forbid appropriations to aid parochial schools[83] and some contain expressed prohibition of both.[84]

72. 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948).
73. Bradfield v. Roberts, 175 U.S. 291, 20 Sup. Ct. 121, 44 L. Ed. 168 (1899).
74. Cochran v. Board of Education, 281 U.S. 370, 50 Sup. Ct. 335, 74 L. Ed. 913 (1930).
75. Everson v. Board of Education, 330 U.S. 1, 67 Sup. Ct. 504, 91 L. Ed. 711 (1947).
76. UTAH CONST. Art. I, § 4.
77. ILL. CONST. Art. II, § 3.
78. *E.g.*, CALIF. CONST. Art. IV, § 30; MISS. CONST. Art. 4, § 66.
79. *E.g.*, GA. CONST. Art. I, § 1, ¶ XIV; WYO. CONST. Art. I, § 19.
80. ORE. CONST. Art. I, § 5.
81. MICH. CONST. Art. V, § 26.
82. *E.g.*, IDAHO CONST. Art. IX, § 5.
83. *E.g.*, MISS. CONST. Art. 8, § 208; FLA. CONST. Art. XII, § 13.
84. *E.g.*, NEB. CONST. Art. VII, § 11; S.D. CONST. Art. VIII, § 16.

State courts have been virtually unanimous in declaring unconstitutional any attempt to pay sums directly to schools organized by religious groups.[85] Beyond this core of agreement the states have widely diverged in deciding what is constitutionally permissible state aid to religion. The cost of caring for students who are public charges in a religiously controlled institution may be paid in some states but not in others.[86] It is constitutional in at least two states to furnish free textbooks to scholars in church schools.[87]

The emergence of the consolidated school, made possible by school-bus transportation throughout a large area, and the increased number of parochial schools have combined to present the courts with a difficult question of Church-State relationship: may publicly financed bus transportation be furnished to parochial school students? An increasing minority of state courts has permitted the school bus expenditure, principally on the ground that the appropriation was not for the benefit of the sectarian schools, but rather for the safety and welfare of the pupils who attend them.[88] The appropriation is usually characterized as a form of public welfare legislation. In New York after the court of appeals had declared free bus transportation to parochial schools a violation of New York's constitution, an amendment was added expressly permitting the expenditure of money for bus transportation.[89]

The majority position was reinforced in 1949 by a Washington opinion[90] handed down after the United States Supreme Court case, *Everson v. Board of Education*,[91] which removed any Fourteenth Amendment obstacles to appropriations for free bus transportation to church schools. The Washington court refused to allow the expenditure because of state constitutional provisions that common school funds should be applied exclusively to the support of the common schools, and that all schools maintained by public funds should be forever free from sectarian influence. The relative importance of the *Everson* case in the state of Washington was sharply stated:

"Our own state constitution provides that no public money or property shall be used in support of institutions wherein the tenets of a particular religion are taught.

85. *E.g.*, Wright v. School Dist., 151 Kan. 485, 99 P.2d 737 (1940); State *ex rel.* Public School District v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932). See also Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917).

86. *Compare* Sargent v. Board of Education, 177 N.Y. 317, 69 N.E. 722 (1904), *with* State *ex rel.* Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882). See also New Haven v. Town of Torrington, 132 Conn. 194, 43 A.2d 455 (1945); Murrow Indian Orphans Home v. Childers, 197 Okla. 249, 171 P.2d 600 (1946).

87. Cochran v. Louisiana State Board of Education, 168 La. 1030, 123 So. 664 (1929); Chance v. Mississippi State Textbook Board, 190 Miss. 453, 200 So. 706 (1941).

88. Bowker v. Baker, 73 Cal. App.2d 653, 167 P.2d 256 (1946); Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945); Board of Education v. Wheat, 174 Md. 314, 199 Atl. 628 (1938); Everson v. Board of Education, 133 N.J.L. 350, 44 A.2d 333 (1945), are cases upholding a school bus expenditure. Leading cases to the contrary are State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (1934); Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576 (1938); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941); Mitchell v. Consolidated School Dist., 17 Wash.2d 61, 135 P.2d 79 (1943).

89. N.Y. CONST. Art. XI, § 4.

90. Visser v. Nooksack Valley School Dist., 33 Wash.2d 699, 207 P.2d 198 (1949).

91. 330 U.S. 1, 67 Sup. Ct. 504, 91 L. Ed. 711 (1947).

> Although the decisions of the United States supreme court are entitled to the highest consideration as they bear on related questions before this court, we must, in the light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the Everson majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not in *support* of such schools. While the degree of support necessary to constitute an establishment of religion under the First Amendment to the Federal constitution is foreclosed from consideration by reason of the decision in the Everson case, supra, we are constrained to hold that the Washington constitution although based upon the same precepts, is a clear denial of the rights herein asserted by the appellant."[92]

The failure of the family and the Sunday school to provide what many people regard as adequate religious instruction has resulted in widespread attempts to incorporate some form of religious instruction into the public school system. Religious instruction, even though offered on a tripartite basis with separate instruction for Catholics, Protestants and Jews, cannot be carried on as part of the compulsory school work without violating both the state and federal constitutions. The state of Washington has even declared it unconstitutional to give high school credit for religious study done outside the school.[93] School boards in cooperation with religious groups have sought to use the apparatus of the public school to aid religious education by various "released time" plans. These schemes vary a great deal in detail but characteristic of most are: (1) religious instruction by teachers provided by religious groups; (2) a meeting time during the regular school hours; (3) provisions that nonparticipating pupils be kept in school supposedly busy with other work. In *Illinois* ex rel. *McCollum v. Board of Education*,[94] the United States Supreme Court invalidated a "released time" system in which the religious instruction was given in the public school building itself. Religious groups have attempted to satisfy the *McCollum* case by formulating methods of religious study not within its ban. Two opinions in the lower courts have upheld a New York arrangement by which religious instruction is given outside the school houses and by which no attempt is made to prevent the released pupils from "playing hookey."[95]

A great many schools which do not have formal religious instruction begin each day with a recital of the Lord's Prayer and the reading of passages from the Bible without comment by the teacher. The constitutionality of Bible reading in school has been a very fruitful source of Church-State litigation.

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92. 207 P.2d at 205 (italics are the court's).
93. State v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918).
94. 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948).
95. Lewis v. Spaulding, 193 Misc. 66, 85 N.Y.S.2d 682 (Sup. Ct. 1948); Zorach v. Clauson, 99 N.Y.S.2d 339 (Sup. Ct. 1950). The present New York scheme was approved by the Illinois Supreme Court before the *McCullom* case. People *ex rel.* Latimer v. Board of Education, 394 Ill. 228, 68 N.E.2d 305 (1946). Gordon v. Board of Education, 78 Cal. App.2d. 464, 178 P.2d 488 (1947) is also a pre-*McCullom* case upholding an off-campus released time system.

Although there has been some dissent, particularly in older cases,[96] the great majority of states permit the reading as well as the prayer.[97] In 1950 the Supreme Court of New Jersey upheld the constitutionality of a state statute which required the reading of at least five verses of the Old Testament each morning and the repeating of the Lord's Prayer.[98] To the Court the Old Testament is not sectarian, being accepted by Jews, Catholics, Protestants and other religions. Religious groups not looking for guidance from the Old Testament are a small minority in this country and their impact on our national life negligible. A belief in God is the warp and woof of our social and governmental fabric. It may be of the highest importance for the nation to retain its belief in God. The daily reading of a few portions of the Old Testament and the repeating of the Lord's Prayer, the Court said, may serve the keep that belief alive. Implanting a belief in God may be the nation's last defense against Communism.

There have been instances in which a parochial school has, in effect, been taken over by the public school system. A case from Indiana will serve as an example.[99] The city of Vincennes incorporated three Catholic schools into its public school system. The church contributed the buildings, heat, utilities and janitor service. The city hired as teachers the sisters and brothers who had formerly taught in the parochial school. The teachers remained in religious garb and the school buildings retained all the religious devices and pictures. The Catholic children of Vincennes were permitted to attend these schools irrespective of the school district in which they lived. The schools conformed to the public school curriculum. Supposedly voluntary religious instruction was given the pupils in a nearby Roman Catholic Church for thirty minutes each morning, immediately before the hours of school. The Indiana Supreme Court refused to hold the arrangements unconstitutional. This decision goes very far indeed toward upholding state advancement of religious ends. Not only does the result approve direct governmental pro-

96. People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Board, 136 La. 1034, 68 So. 116 (1915); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890); *cf.* Board of Education v. Minor, 23 Ohio St. 211 (1872); Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929).

97. *E.g.,* People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Wilkerson v. Rome, 152 Ga. 762, 110 S.E. 895 (1922); Kaplan v. Independent School Dist., 171 Minn. 142, 214 N.W. 18 (1927); Lewis v. Board of Education, 157 Misc. 520, 285 N.Y.S. 164 (Sup. Ct. 1930), 247 App. Div. 106, 286 N.Y.S. 174 (1st Dep't 1936), *appeal dismissed,* 276 N.Y. 490, 12 N.E.2d 172 (1937). Art. 3, § 18 of the Mississippi Constitution expressly permits Bible reading in the public schools.

98. Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950).

99. State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940). School boards have been permitted to employ teachers who were members of religious orders although the teachers continued to wear religious garb in the classroom. Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936); Hysong v. Galitzin School Dist., 164 Pa. 629, 30 Atl. 482 (1894). There are state cases *contra* to the Indiana case, *supra.* See, *e.g.,* Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1941).

motion of religion but it also permits instruction in the tenets of a particular church.

Not every Church-State question revolves around the school room. Litigants have sometimes unsuccessfully attacked the tax exemption of religious institutions.[100] The argument that a particular appropriation is a public welfare expenditure and not an aid to religion becomes especially acute when payments are made directly to sectarian charitable institutions who, though controlled by some religious group, nevertheless operate as hospitals, orphanages and old peoples' homes. One recent case raising this issue upheld the constitutionality of a Mississippi appropriation for the erection of certain hospital buildings which were to be added to church hospitals.[101] The expenditure did not violate a section of the Mississippi State Constitution which provides: "No law granting a donation or gratuity . . . shall be enacted . . . for a sectarian purpose or use."[102] The appropriation was not considered a donation or gratuity, but rather an expenditure for which the state would receive a *quid pro quo*. The constitution did not forbid appropriations to sectarian institutions but merely for a sectarian purpose. Thus the Mississippi Supreme Court was able to distinguish cases from other jurisdictions which had held similar appropriations violations of their state constitutions because in those states appropriations to sectarian institutions, as such, were flatly prohibited.[103]

In 1948, the Supreme Court of Utah in two cases sustained public expenditures allegedly made for a religious purpose. In one case a statute was upheld which permitted former Mormon parochial school teachers to receive credit, when computing retirement benefits in the public schools, for services rendered during their period as instructors in the Mormon school system.[104] In sustaining the enactment the Utah Court pointed out that Mormon parochial schools no longer exist. No Mormon school teachers were presently building up state retirement benefits by service in the parochial schools. The court thought the statute accomplished an important public purpose by attracting teachers into the public school system after the church schools were closed in 1937. In the second case the plaintiff sought to enjoin the Daughters of the Utah Pioneers from carrying out legislatively authorized construction of a Pioneer Memorial building in which the D.U.P. would

100. *E.g.*, Trustees of First Methodist Church v. Atlanta, 76 Ga. 181 (1886); Garrett Biblical Inst. v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928). See Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144, 145-48 (1950).

101. Craig v. Mercy Hospital, 45 So.2d 809 (Miss. 1950). The result has also been reached recently in Kentucky. Kentucky Building Comm'n v. Effron, 310 Ky. 355, 220 S.W.2d 836 (1949).

102. MISS. CONST. Art. IV, § 66.

103. *E.g.*, Collins v. Kephart, 271 Pa. 428, 117 Atl. 440 (1921); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891).

104. Gubler v. Utah State Teachers' Retirement Board, 192 P.2d 580 (Utah 1948).

display historical relics.[105] In order to understand this controversy, it is necessary to know something of the Daughters of the Utah Pioneers. They are a group of women, over the age of eighteen, who are lineal descendents of settlers who came to Utah prior to the advent of the railroad on May 10, 1869. The group is devoted to the study of state history, religious history and geneology. The overwhelming majority of the members are Mormons or of Mormon ancestory. One of the announced objects of the organization is to seek and promote the purposes that the pioneers had in view when they came to Utah and to teach their descendents and the citizens of the country those lessons of faith, courage and patriotism. At the local level the association is set up along the geographical lines of the Latter Day Saints Church. According to the plaintiffs the organization would use the building and the exhibits as an opportunity for aggressive proselytizing. However, the Utah court upheld the validity of the expenditure. The majority opinion took cognizance of the membership of non-Mormons in the organization; and failed to see any present evidence of the plaintiff's fears. The plaintiff's entire case rested on the character of the D.U.P. and its intentions in connection with the use of the building. In Utah to commemorate early state history is necessarily to emphasize objects and documents which have a distinctive religious significance.

Sometimes complaint is made if public officials and legislatures lend their aid to the enforcement of religious holidays. Sunday legislation has been frequently attacked with conspicuous lack of success as an unconstitutional violation of Church-State separation.[106]

Two recent cases limit the use of the facilities of religious organizations as part of a state court's remedial system. An Illinois statute, attempting to minimize some of the social problems of divorce, set up a divorce division in some courts. The division could attempt to reconcile the estranged parties and could make independent investigations regarding alimony, child custody and support. In the reconciliation process, the division was empowered to invite the assistance of representatives of the religious denominations to which the parties belonged. The Supreme Court of Illinois could see no difference between this situation and that in the *McCollum* case.[107] In the eyes of the Illinois Court the statute used a tax-established and tax-supported instrumentality of justice to aid religious groups in spreading their faith. In Virginia the Supreme Court reversed a lower court judge who had placed delinquent children on probation upon the condition, among others, that each child would attend Sunday school and church for a year.[108]

105. Thomas v. Daughters of the Utah Pioneers, 197 P.2d 477 (Utah 1948).
106. Paramount-Richards Theaters v. Hattiesburg, 49 So.2d 574 (Miss. 1950); People v. Friedman, 96 N.E.2d 184 (N.Y. 1950); State v. Grabinski, 33 Wash.2d 603, 206 P.2d 1022 (1949) are recent examples.
107. People *ex rel.* Bernat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 (1950).
108. Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

CONCLUSION

Although state constitutions contain full statements of our civil liberties, on the whole the record of state court guardianship of "First Amendment Freedoms" is disappointing. Only occasionally do state cases concerned with freedom of press, speech, assembly and worship take a position protecting the freedoms beyond what has been required by the United States Supreme Court. The actions of the Florida and Pennsylvania Courts upholding anti-sound truck ordinances after the *Kovacs* case are far more typical. Time and time again, the United States Supreme Court has found it necessary to reverse many state courts which were oversolicitous of local attempts to silence unpopular ideas on the ground of traffic control, the administration of public parks or the possibility of violence.

Even more disheartening is the failure of state supreme courts to see a threat to personal liberty in the many oath requirements imposed particularly upon public employees. The opinions, too often, accept uncritically Mr. Justice Holmes' dictum that a man "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[109] With an ever increasing number of persons working for the state such restrictions on freedom of expression can impose political sterility on a substantial segment of the community. State court judges seem to have forgotten that the most important function of freedom is not to benefit the individual but to confer upon the whole community the good which comes from the free interchange of ideas.

Contemporary cases show an increasing reluctance to invalidate state aids to religion. Instead of maintaining a "wall of separation" many state courts have upheld enactments benefiting religion by narrow technical reading of their state constitutions.[110] Typically, assistance is not forbidden to religion but merely to the various sects as such. The historic principle of complete state neutrality in religious affairs is ofttimes forgotten.

Thus the role of the United States Supreme Court in protecting our freedom becomes crucial. Unlike economic arrangements civil liberties can not become matters for state experimentation. In this light the refusal of the present Supreme Court to take many important civil liberties cases from to the state courts is unsound indeed. If our liberties are not protected in Des Moines the only hope is in Washington.

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109. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

110. Legislation providing for bus transportation to church schools was first invalidated in Kentucky on the ground that the Kentucky Constitution expressly forbade the diversion of school funds for sectarian purposes. Sherrard v. Board of Education, 294 Ky. 469, 171 S.W.2d 963 (1942). In Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945), the use of state funds other than school funds was approved for buses to parochial schools.