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## Constitutional Law

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## CONSTITUTIONAL LAW

## SECTARIAN LITERATURE IN PUBLIC SCHOOLS

*New Mexico.* The recent case of *Miller v. Cooper*<sup>1</sup> is concerned with the controversial issue of the separation of Church and State in the United States. In this case the court enjoined the dissemination of sectarian religious magazines among the pupils of the New Mexico public schools. The decision was based on the idea that such acts were a violation of the doctrine of separation of Church and State. This constitutional principle of separation of Church and State is founded on the First Amendment of the Constitution and is made applicable to the states by the Fourteenth Amendment.<sup>2</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>3</sup>

In the *Miller* case the plaintiffs brought the action in their capacity as taxpayers and school board members. The object of the suit was to bar the defendants from teaching in the public schools. Plaintiffs charged that the holding of the public school's baccalaureate services and commencement exercises in church buildings constituted a violation of the federal and state constitutional provisions relating to the separation of Church and State. It was further alleged that the distribution of sectarian religious magazines to the students was a violation of constitutional provisions.

The court, in refusing to bar the teachers from New Mexico schools, disposed of the first charge dealing with the graduation exercises by saying that this type of co-operation between Church and State was not prohibited by the Constitution. The point was added that church buildings are often the only places with adequate facilities to handle the people who wish to attend graduation

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<sup>1</sup> \_\_\_\_ N. M., 244 P. 2d 520 (1952).

<sup>2</sup> Illinois *ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210 (1948); see CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE (1951) 109.

<sup>3</sup> U. S. CONST. AMEND. I.

exercises. However, the court did hold that the dissemination of church literature was a violation of the doctrine of separation of Church and State. The religious pamphlets in the instant case were kept on the tables in the school room and were there for the students to read or take home.

The *Miller* case brings to mind the 1952 United States Supreme Court decision in *Zorach v. Clauson*,<sup>4</sup> wherein the Court upheld a New York "released time" program of religious instruction. In this "released time" program a pupil, upon the written request of his parents, is excused from his classwork for a certain period during the day. He is then allowed to attend religious instruction of his own choice at various centers off the school grounds. The Court said that the "released time" program in the *Zorach* case was valid because it involved "neither religious instruction in public school classrooms nor the expenditure of public funds." The court distinguished this case from the much discussed *McCollum* case<sup>5</sup> in which an Illinois "released time" program was held invalid.

The *Zorach* case held that religious instruction off the school premises was permissible; so it would seem that the court in the *Miller* case was on firm ground in upholding public school graduation exercises in church buildings.

The dissemination of religious literature in the *Miller* case presents a different question. While it is true that the pupils were not being taught courses in religion, still they were being subjected to church teachings in the form of religious pamphlets. The pamphlets were left on tables in the classroom, and the supply

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<sup>4</sup> 343 U. S. 306 (1952).

<sup>5</sup> *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948). Public school children, whose parents signed request cards, were released from secular instruction in order that they might attend religious classes during school hours in the public school building. Teachers and necessary materials were provided by a local interfaith council, subject to the approval and supervision of the superintendent of schools. Attendance records were kept, and pupils who did not attend the religious instruction were required to report for their regular studies.

was replenished from time to time.<sup>6</sup> Still another factor militating against allowing the literature in the classrooms was the fact that the tracts were all published by the same denomination. Had religious pamphlets of a non-sectarian nature been available for the school children, the court might have been disposed to treat them as reference or library materials.<sup>7</sup> But see Mr. Justice Black's dissent in the *Zorach* case to the effect that a state can no more "aid all religions" than it can aid one.<sup>8</sup>

It appears that such preference as was present in the *Miller* case would be held violative of the Constitution by the staunchest proponents of a closer unity between Church and State.<sup>9</sup>

The decision in the *Miller* case is apparently in line with the United States Supreme Court's idea that religion in any form, if it is in the public school classroom, is a violation of the principle of separation of Church and State.<sup>10</sup>

The "wall of separation between Church and State" may be, as Mr. Justice Reed contends, "a figure of speech"<sup>11</sup>, but it is a wall none the less. Evidently the United States Supreme Court feels that when it comes to religion in the public school classroom itself, the "wall" is impregnable and such attempted religious instruction will be struck down.

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<sup>6</sup> 244 P. 2d at 521.

<sup>7</sup> *Evans v. Selma Union High School*, 193 Cal. 54, 222 Pac. 801 (1924) (mere act of purchasing a book for a school library held not to carry any implication of adoption of dogma or theory therein, nor any approval of the book itself, except as a work of literature fit for a library).

<sup>8</sup> *Zorach v. Clauson*, 343 U. S. 306, 318 (1952).

<sup>9</sup> CORWIN, *op. cit. supra* note 2, at 116.

<sup>10</sup> *Zorach v. Clauson*, 343 U. S. 306, 315 (1952).

<sup>11</sup> *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 247 (1948).

CONSTITUTIONALITY OF  
STATUTE REQUIRING LICENSING OF WATCHMAKERS

*Oklahoma.* A county attorney sought an injunction to restrain Wood from engaging in the practice of watchmaking without first having obtained a license as required by the Watchmaking Act of 1945.<sup>12</sup> Wood demurred on the ground that the Act was unconstitutional. The court in sustaining Wood's demurrer said that such an act deprived Wood of the fruits of his own industry. The court declared the Act to be "unreasonable, arbitrary and discriminatory." It was held in effect that the Act was not designed to promote the general welfare or contribute to public morals. Such an act deprived Wood of a valuable property right without due process of law.<sup>13</sup>

The Act in question provided that a prospective watchmaker must obtain a certificate from the Board of Examiners. The applicant for a certificate had to serve a four-year apprenticeship or its equivalent under a licensed watchmaker and with the watchmaker's consent before he was qualified for a certificate.<sup>14</sup>

This decision brings to mind the question of how far the legislature will be permitted to go in subjecting certain occupations and professions to licensing provisions. It is well settled that the "state under its police power has the right to regulate any and all kinds of business in order to protect the public health, morals, and welfare, subject to the restrictions of reasonable classification."<sup>15</sup>

The difficulty lies in picking out occupations and professions that so affect the health, welfare, and morals of the people as to render themselves amenable to the police power of the state. It

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<sup>12</sup> Okla. Laws 1945, c. 18; 59 OKLA. STAT. ANN. (Perm. ed.) §§ 771-782.

<sup>13</sup> State *ex rel.* Whetsel, County Attorney v. Wood, .....Okla....., 248 P. 2d 612 (1952).

<sup>14</sup> 59 OKLA. STAT. ANN. (Perm. ed.) §§ 771-782.

<sup>15</sup> 11 AM. JUR., *Constitutional Law*, § 284.

appears obvious that occupations that are closely related to the health of the public are proper subjects for regulatory legislation. Accordingly, the state may require certain standards of training and proficiency before granting such persons a license to operate.

Among professions said to be so closely allied to the health and welfare of the public as to be subject to state regulation are the specialized callings of law, medicine and surgery, chiropractic, dentistry, nursing, accountancy, pharmacy, architecture, civil engineering, plumbing, and barbering.<sup>16</sup> The welfare of the community requires that the highest standards of ability and proficiency be demanded of those who would follow the professions enumerated.

But what about watchmaking? Does the public welfare demand that watchmakers be subjected to regulations similar to those applied to barbers or pharmacists? The Oklahoma court in the instant case pointed out that such regulations were proper when applied to callings that were affected with a public interest, but the court said that watchmaking was not one of these professions so affected. The court pointed out that "while watchmaking is an important calling, it is not such a business as affects the public health, safety, and welfare."<sup>17</sup>

In all probability the strict requirements set out in the Watchmaking Act influenced the court in its decision. In effect the Act provided a way whereby presently licensed watchmakers could limit the number of future watchmakers by refusing to grant them the four-year apprentice period required by the Act. The court was cognizant of this fact when it said that "this provision has the effect of placing in the hands of those holding a license the power to limit the number of those allowed to engage in watchmaking in Oklahoma, and clearly tends toward creating a monopoly."<sup>18</sup>

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<sup>16</sup> *Id.*, § 275.

<sup>17</sup> 248 P. 2d at 615.

<sup>18</sup> 248 P. 2d at 614.

Aside from holding the Watchmaking Act unreasonable, arbitrary and discriminatory, and not tending to promote the public welfare, the court went on to say that the Act might result in denying some citizens their inherent right to earn a livelihood in a private field. By way of amplifying this point the court observed that the Act prohibited a person who may be thoroughly trained and qualified from pursuing his chosen calling. This in effect would deprive the person of the fruits of his own labor and would take away a valuable property right without due process of law.

States in recent years have been prone to require licensing of numerous professions and specialized callings. A survey of the states in the Southwest discloses regulatory legislation in regard to the following professions or occupations.

Arkansas has statutes dealing with accountants, attorneys, barbers, chiropody, civil engineering, dentists, nurses, optometry, osteopaths, pharmacy, physicians, surgeons and midwives, real estate and business brokers, veterinarians, and, listed under miscellaneous occupations, pawnbrokers, second-hand dealers, and transient merchants.<sup>19</sup>

Louisiana has statutes dealing with accountants, architects, attorneys, barbers, cosmetic therapy, chiropody, civil engineering, dentists, embalming and funeral directors, nurses, optometry, osteopaths, pharmacy, physicians, surgeons and midwives, plumbers, real estate and business brokers, veterinarians, watchmakers, and, listed under miscellaneous occupations, pawnbrokers, second hand dealers and transient merchants.<sup>20</sup>

New Mexico has statutes covering accountants, architects, attorneys, barbers, cosmetic therapy, chiropody, civil engineering, dentists, embalming and funeral directors, nurses, optometry,

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<sup>19</sup> ARK. STAT. 1947 ANN. §§ 19-3701, 25-101, 67-1101, 71-501, -601, -1001, -1301, 72-301, -501, -601, -701, -801, -901, -1001, -1101.

<sup>20</sup> 37 LA. STAT. ANN. (West, 1951) §§ 71, 141, 211, 341, 425, 611, 681, 704, 790, 961, 1041, 1111, 1171, 1261, 1361, 1431, 1513, 1581, 1751.

osteopaths, pharmacy, physicians, surgeons and midwives, veterinarians and junk dealers.<sup>21</sup>

Oklahoma has statutes regulating accountants, architects, attorneys, barbers, cosmetic therapy, chiropody, civil engineering, dentists, embalming and funeral directors, nurses, optometry, osteopaths, pharmacy, physicians, surgeons and midwives, plumbers, real estate and business brokers, veterinarians, watchmaking, and, listed under miscellaneous occupations, pawnbrokers, second hand dealers and transient merchants.<sup>22</sup>

Texas has statutes dealing with accountants, architects, attorneys, barbers, cosmetic therapy, chiropody, civil engineering, dentists, embalming and funeral directors, nurses, optometry, osteopaths, pharmacy, physicians, surgeons and midwives, plumbers, real estate and business brokers, veterinarians, and, listed under miscellaneous occupations, pawnbrokers, second hand dealers and transient merchants.<sup>23</sup>

From the above listings it is seen that in almost all instances the regulated profession is closely allied with the public welfare of the community. The lists set out above are in no sense exhaustive, but they do offer examples of "businesses affected with a public interest."

It is suggested that the Oklahoma court was correct in declaring the Watchmaking Act unconstitutional. There is not a close enough relation between watchmaking and the public welfare to denominate the profession of watchmaking as one affected with a public interest. The North Carolina court phrased the statement in a most cogent manner in the case of *State v. Ballance*.<sup>24</sup> This case dealt with the constitutionality of a law requiring the licensing of

<sup>21</sup> N. M. STAT. 1941 ANN. §§ 18-101, 51-201, -401, -501, -601, -701, -801, -901, -1001, -1401, -1601, -1701, -2301, -2401, -2601.

<sup>22</sup> 5 OKLA. STAT. ANN. (Perm. ed.) § 1; 11 *id.*, § 452; 21 *id.*, § 1091; 59 *id.*, §§ 1, 45.1, 61, 111, 198, 221, 331, 396, 411, 481, 551, 581, 621, 676, 771, 831.

<sup>23</sup> TEX. REV. CIV. STAT. (Vernon, 1948) arts. 41a, 249a, 304, 3271a, 4495, 4513, 4542a, 4543, 4552, 4567, 4576a, 6146, 6243-101, 6573a, 7448. TEX. PEN. CODE (Vernon, 1948) art. 728.

<sup>24</sup> 229 N. C. 764, 51 S. E. 2d 731, 736 (1949).



photographers. In holding such a law unconstitutional the court asked this question, "Yet, who would maintain that the legislature would promote the general welfare by requiring a mental and moral examination preliminary to permitting individuals to engage in these vocations merely because they involve knowledge and skill?"

If a lawful business is of a beneficial character, and not dangerous to the public, either directly or indirectly, police regulation seems unwarranted and properly struck down under constitutional guaranties.<sup>25</sup>

*Bob Price.*

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<sup>25</sup> 11 AM. JUR., *Constitutional Law*, § 285.