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CONSTITUTIONAL LAW-RELIGION IN THE PUBLIC SCHOOL

CONSTITUTIONAL LAW—RELIGION IN THE PUBLIC SCHOOLS—Plaintiff sued as a taxpayer to enjoin defendant from permitting the use of school buildings by organizations of pupils based on religious affiliations,[1] and from directing the reading of excerpts from the Bible in the public schools. Plaintiff contended that in so far as the Greater New York Charter impliedly authorized the use of the Bible for such purposes, it was unconstitutional. *Held*, the action of the school board was proper, and injunction denied. *Lewis v. Board of Education of City of New York*, (N. Y. Sup. Ct. 1935) 285 N. Y. S. 164.[2]

Few branches of constitutional law, apart from those involving economic issues, have occasioned sharper controversy than that involving the guaranty of religious freedom. In reaction to their experience of religious oppression and new philosophical ideas of separation of church from state,[3] the states ratifying the constitution demanded a guaranty against interference by Congress with religious freedom, which led to the adoption of the First Amendment. Ultimately, every state came to adopt a similar prohibition on its own legislative department. Although these provisions vary considerably from state to state, the tendency of the courts is to interpret them all alike, quoting decisions freely from other states and disregarding differences in wording.[4] The essential problem in

[1] E.g., the Protestant Y. M. C. A., Y. W. C. A., and Hi-Y, the Catholic Newman Club, and the Hebrew Menorah and Junior Hadassah Clubs.

[2] There was a preliminary question whether, even if the board's action was unconstitutional, a taxpayer could maintain a suit to enjoin it. The New York statutes [3 N. Y. Consol. Laws (Birdseye, 2d ed., 1917), L. 1909, c. 29, § 51] authorize a taxpayer's suit to restrain officers of municipal corporations "to prevent any official illegal act . . . waste or injury to . . . property, funds or estate of such municipal corporation. . . . " Lewis v. Board of Education of City of New York, 258 N. Y. 117, 179 N. E. 315 (1932), held that since the board of education is a subdivision of the state and not of the city, a taxpayer cannot enjoin the illegal use of property already purchased, but only a threatened use of city funds to purchase new property illegally. There is nothing in the reported facts of the principal case to indicate a threatened purchase of new Bibles, so it would seem that the supreme court should have dismissed the bill on that ground. The court considers the question (at p. 171), but its decision on the point is ambiguous and inconclusive, and it places chief reliance upon the substantive aspect of the case. In other states, while most suits have been brought by parents of school children, taxpayer's actions have also been permitted.

[3] See Goddard, "The Law in the United States in Its Relation to Religion," 10 MICH. L. REV. 161 (1912), for an extensive analysis of the causes leading to the constitutional guaranties of religious freedom.

[4] For a summary of the constitutional provisions, see 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., c. 12 (1927). Art. I, sec. 3, of the New York Constitution,

applying the guaranties to public education is to determine how far a school may go in introducing religion and religious works into its educational program. The correct test would seem to make the answer depend on the *purpose* for which the religious works are introduced. It is clear that sectarian teaching falls within the proscription; [5] on the other hand, where the end sought is purely intellectual or the development of morality or character, the Bible or clearly sectarian literature should be permitted, just as the Koran or the writings of Confucius or Milton would be. In the middle ground, where the education is primarily religious but not sectarian, the authorities are not so clear, but it would seem that a broad interpretation would extend the prohibition to any religious teaching as such: freedom of religious belief should include freedom to the atheist or agnostic as well as to the Christian.[6] Coming to the specific question of whether the legislature or the board of education can constitutionally authorize the reading of the Bible without comment at school assemblies, we find the courts badly split. Where pupils who do not wish to attend are excused from the Bible exercises, a majority of the courts hold the action proper.[7] Where, however, attend-

[1 N. Y. Consol. Laws (Birdseye, 2d ed., 1917), 45, 267] which the court in its opinion does not even mention, provides that, "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind. . . . " Art. IX, sec. 4, states: "Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning . . . in which any denominational tenet or doctrine is taught." The latter section might be construed to mean only that denominations of Christianity cannot be taught; but, reading the two provisions together, a broader interpretation would extend the prohibition of the teaching of religion itself.

[5] Goddard, "The Law in the United States in Its Relation to Religion," 10 MICH. L. REV. 161 (1912).

[6] See People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910). In Pfeiffer v. Board of Education, 118 Mich. 560 at 565, 77 N. W. 250 (1898), the court quoted Art. III of the Ordinance of 1787 [2 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 957 at 961 (1909)]: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." The court reasoned that what the ordinance declared as one of the prime purposes of education could not have been intended to be prohibited by a constitution adopted under its authority. But the Ordinance might be interpreted to mean that the study of religion, rather than religious worship, was to be fostered. The court's construction would seem to permit, and even require, the schools to devote part of their time to religious worship, which would make it necessary for the school authorities to determine what the true religion is and thus interfere with explicit guaranties of religious freedom. For a different interpretation of this clause, see Board of Education of Cincinnati v. Minor, 23 Ohio St. 211 (1872).

[7] Kaplan v. Independent School District of Virginia, 171 Minn. 142, 214 N. W. 18 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S. E. 895 (1922); People v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Pfeiffer v. Board of Education, 118 Mich. 560, 77 N. W. 250 (1898); Moore v. Monroe, 64 Iowa 367, 20 N. W. 475 (1884); Spiller v. Inhabitants of Woburn, 12 Allen (94 Mass.) 127 (1886). *Contra*: State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N. W. 967 (1890); State ex

ance is compulsory, the split in authority of the decided cases is more even; [8] and the Colorado court held that such compulsion is a violation of the liberty guaranteed by the Fourteenth Amendment.[9] Apart from the latter view, the usual approach of the courts has been to determine whether the Bible is a sectarian work: on the one hand, it is argued that it must necessarily be, since Christian denominations recognize different versions as authoritative; and on the other, that at least parts of the Bible or its general principles are accepted by all creeds. But this approach seems faulty in two respects: first, it puts chief emphasis on the nature of the Bible itself, and disregards the purpose for which it is employed; and second, in so far as it does recognize purpose as controlling, it makes the result depend on whether the education is sectarian and not the broader one suggested above of whether it is religious. Under such broader view, it would seem that Bible reading at morning assemblies should fall within the constitutional proscription, since the obvious purpose of such reading is worship.[10] On the other problem in the principal case, the decision of the court that use of school buildings by student organizations with religious affiliations is proper seems unquestionably correct. As the court points out, the purpose for which the building is used and not the religious ties of the user is decisive, and the purpose involved here is primarily secular.[11]

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rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918) (not quite in point). In practically every case, vigorous dissents were registered.

[8] Holding the action constitutional: Hackett v. Brooksville Graded School District, 120 Ky. 608, 87 S. W. 792 (1905); Donahoe v. Richards, 38 Me. 376 (1854) (decision was that parent has no cause of action against public school where it expelled a child for refusing to read the Bible); Church v. Bullock, 104 Tex. 1, 109 S. W. 115 (1908); Douglass v. Byers, 69 Kan. 53, 76 P. 422 (1904) (attendance was compulsory, though the rule was voluntarily relaxed by the school officials in this instance). *Contra*: Herold v. Parish Board of School Directors, 136 La. 1034, 68 So. 116 (1915); State v. Scheve, 65 Neb. 953, 876, 91 N. W. 846 (1902); People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910); State ex rel. Finger v. Weedman, 55 S. D. 343, 226 N. W. 348 (1929).

[9] People v. Stanley, 81 Colo. 276, 255 P. 610 (1927). The theory was that parents have a right to determine what subjects their children will study in school, except as to those essential to good citizenship. Dissenting opinion contended that a parent has no such right, except to keep his children from being compelled to take immoral subjects. The United States Supreme Court has not directly passed on the question. Unless such right exists, it seems unsound to draw a distinction between compulsory and voluntary attendance—as the dissenting justice in the Kaplan case (see footnote 8) pointed out, the same discrimination is present in either case since a student who gets excused is likely to be scoffed at by fellow students.

[10] It has been contended that the purpose of Bible reading is to inculcate in pupils morality or good citizenship, which are legitimate ends of secular education; but anyone familiar with the facts knows that, while conceivably the Bible might be used for that purpose, its use at school assemblies is in fact religious in character.

[11] A number of cases have held that school buildings can be used for purely religious meetings when no interference with school work results. 5 A. L. R. 866 at 886 (1920).

For cases on other problems in connection with religion in public schools, see 5 A. L. R. 866 (1920); 20 A. L. R. 1351 (1922); 31 A. L. R. 1125 (1924); 57 A. L. R. 195 (1928).