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Constitutional Law - Separation of Church and State - Bible Reading in the Public Schools

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CONSTITUTIONAL LAW—SEPARATION OF CHURCH AND STATE—BIBLE READING IN THE PUBLIC SCHOOLS—Plaintiffs, as parents of children in the public school system,[1] sought to enjoin and have declared unconstitutional the practice of reading aloud to students each day ten verses of the Holy Bible[2] as required by a Pennsylvania statute.[3] The plaintiffs contended that this practice constituted an establishment of religion and a prohibition of the free exercise thereof and was therefore a violation of rights guaranteed by

1 The plaintiffs also appeared individually in their own right, and the court concluded that these rights were clearly interfered with. "If the faith of a child is developed inconsistently with the faith of the parent and contrary to the wishes of the parent, interference with the familial right of the parent to inculcate in the child the religion the parent desires, is clear beyond doubt." Principal case at 407.

2 The reading from the Bible was always followed by a group recitation of the Lord's Prayer. Although at one point the opinion talks of the combination of Bible-reading and recitation of the Lord's Prayer as giving the morning exercise a religious aspect, the court actually states as separate issues and decides as separate conclusions of law: (1) the reading of ten verses of the Holy Bible; (2) the reading of ten verses of the Holy Bible in conjunction with the practice of recitation in unison of the Lord's Prayer. Only the reading of the Bible was required by the statute which was held invalid. The use of the Lord's Prayer was a practice of the local school board.

3 Pa. Stat. Ann. (Purdon, 1950) tit. 24, §15-1516. "At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge. . . ." The statute also provides that any teacher who shall fail to comply with this requirement shall be discharged.

the First Amendment to the United States Constitution.[4] By a three-judge district court,[5] *held,* for plaintiffs. The statute violated the United States Constitution because the Bible is essentially a religious book and the compulsory practice of reading from it to students as part of "morning devotions" amounts to a promotion of religious instruction by the state.[6] *Schempp v. School District of Abington Township,* (E.D. Pa. 1959) 177 F. Supp. 398.

In the area of public education the line between church and state has proved insusceptible of any clear delineation, primarily because the question lends itself more to personal feelings than to strictly defined rules of law.[7] Since the First Amendment has been made applicable to action by the states,[8] the clause of that amendment which protects the free exercise of religion has been defined with some degree of clarity by the federal courts.[9] But the second of the amendment's twin limitations, the clause prohibiting the establishment of religion, has caused more variation in feeling and interpretation by the courts. Finding an establishment of religion by the state, the Supreme Court in *McCollum v. Board of Education*[10] held invalid a program of released-time for religious instruction in the public schools. The Court accepted as a starting point the near-absolute separation language of *Everson v. Board of Education:*[11] "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one over another."[12] From that premise it was easy to classify the religious education program as unconstitutional on two grounds: it was a use of tax-supported property for religious purposes, and it was a use of the state school system to aid religion. Then,

4 U.S. CONST., Amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

5 The suit was brought under 28 U.S.C. (1958) §§1343, 2281, and was heard by a three-judge court pursuant to 28 U.S.C. (1958) §2284. Any application for an injunction restraining the enforcement of a state statute on grounds of unconstitutionality must be heard by a district court of three judges.

6 If the case comes before the Supreme Court for review, it may apply the doctrine of abstention and vacate the judgment until the Pennsylvania Supreme Court interprets the statute. The three-judge court concluded that this doctrine did not apply in this case because the state statute was clear and did not lend itself to varying interpretations. See County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Harrison v. NAACP, 360 U.S. 167 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). See, generally, note, 108 UNIV. PA. L. REV. 226 (1959).

7 See, generally, KAUPER, FRONTIERS OF CONSTITUTIONAL LAW, c. III (1956); JOHNSON, SEPARATION OF CHURCH AND STATE (1948).

8 Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940). These were the first cases to recognize explicitly that the states were limited by the First Amendment through the Fourteenth Amendment although this had been suggested in earlier cases. See Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

9 Most of these cases involve Jehovah's Witnesses. E.g., Cantwell v. Connecticut, note 8 supra; West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

10 333 U.S. 203 (1948).

11 330 U.S. 1 (1947).

12 Id. at 15.

only four years later in *Zorach v. Clauson*,[13] the Court held valid a similar released-time program, the only difference being that the students in *Zorach* were released from school early to attend the religious instruction elsewhere. Although the fact that no tax-supported property was used in *Zorach* afforded one ground for distinguishing it from *McCollum*, the two cases differ essentially in their attitude and approach to the problem. The Court in *McCollum* sought to make the doctrine of separation a high and impregnable wall between church and state.[14] In comparison, the *Zorach* case recognized that separation was necessary but said this doctrine did not require the government to be indifferent to religion, nor not to recognize the needs of the people, as long as no preference was shown.[15] The problem presented in the principal case differs from those released-time cases because the school board does not make the initial admission that Bible reading is religious in character. But once this question is resolved, the problems become similar. While a number of state courts have faced the question of Bible reading in public schools,[16] the instant case is the first federal court decision on the point.[17] It is contrary to most state court decisions,[18] although it is important to note that most of these older decisions came at a time when the First Amendment was not thought to operate as a limitation on the states. The case takes on additional significance because it uses a rationale basically different from that relied upon by the majority of the decisions with which it is in accord.[19] In prior Bible-reading cases unconstitutionality has been equated with sectarianism,[20] which in general terms has meant the teaching of a particular sect's doctrines in preference to others.[21] Thus it is that cases contain extended discussions of differences

[13] 343 U.S. 306 (1952).

[14] 333 U.S. 203 at 211 (1948).

[15] 343 U.S. 306 at 314 (1952).

[16] See 45 A.L.R. (2d) 742 (1956), where the leading cases are abstracted and discussed.

[17] The issue was presented to the Supreme Court of the United States in Doremus v. Board of Education, 5 N.J. 435, 75 A. (2d) 880 (1950), app. dismissed 342 U.S. 429 (1952), but the appeal was dismissed because the plaintiffs were no longer proper parties in interest, since at the time of the appeal they had no children in the public schools.

[18] See 45 A.L.R. (2d) 742 (1956); Cushman, "The Holy Bible and the Public Schools," 40 CORN. L.Q. 475 (1955). It should be noted, however, that many of the decisions upholding Bible-reading involved only challenges under state constitutions, since these cases were decided before the non-establishment clause of the First Amendment was held applicable to state action in Everson v. Board of Education, note 11 supra.

[19] E.g., State ex rel. Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929); Herold v. Parish Board, 136 La. 1034, 68 S. 116 (1915); State v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890).

[20] See, generally, Cushman, "The Holy Bible and the Public Schools," 40 CORN. L.Q. 475 (1955); note, 55 MICH. L. REV. 715 (1957). The use of "sectarianism" as the controlling test is to some extent attributable to the express language of the state constitutions or statutes under which given cases were decided. See, e.g., People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905).

[21] See the authorities cited in Cushman, "The Holy Bible and the Public Schools," 40 CORN. L.Q. 475 at 479 (1955). Some courts went to the point of defining sectarianism, and therefore unconstitutionality, as the teaching of the peculiar tenets of a particular Christian religion. E.g., Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1921).

between particular versions of the Bible.[22] Also, a number of otherwise sectarian procedures were occasionally upheld by finding attendance non-compulsory.[23] The court in the principal case dismisses these factors[24] and looks directly to the question of Bible reading per se.[25] The crucial issue to the court is not whether Bible reading is sectarian in the traditional sense, but simply whether it is religious. Since the Bible is premised upon the recognition of God, the court finds it is primarily a religious work. And the reading of the Bible as an opening class exercise is making use of the Bible in a religious context. The court was careful to point out that it condemned only the practice defined in the statute, and that the use of the Bible in a non-religious context, as in the study of history, music, art, literature or even religion, is not subject to the same disapproval.

It may be argued that the court is still thinking in sectarian terms. First, the Bible is not accepted as authority by all religions, so that its mere use indicates the preference of one religion over another. Or the court may fear that public facilities and funds were being used in a manner favoring those recognizing God over those not doing so.[26] An analysis of this type, although cast in broader terms than that which pervades the earlier state cases, is still sectarian in the sense that it is concerned with whether preference was shown one mode of religious thought. However, the court's language indicates that what it disapproves is not governmental preference for one religious group over another but the mere fact of government participation in religious matters. This is an application of the strong separation thinking of the *McCollum decision*,[27] an approach not taken in prior Bible-reading cases. Because the use of the First Amendment as a limit on state action came after most state decisions on the question, some re-examination of those cases may be necessary. It seems unlikely that any different results

22 People ex rel. Vollmar v. Stanley, note 20 supra; Herold v. Parish Board, note 19 supra. Cf. Tudor v. Board of Education, 14 N.J. 31, 100 A. (2d) 857 (1953).

23 E.g., Spiller v. Woburn, 94 Mass. (12 Allen) 127 (1866). See People ex rel. Stanley v. Vollmar, note 20 supra, at 283. Cf. State ex rel. Finger v. Weedman, note 19 supra.

24 The court found the version of the Bible used immaterial. Principal case at 406. The lack of direct legal compulsion was not decisive, since the teachers were compelled to comply with the statute and since the ". . . mandatory requirement of school attendance puts the children in the path of compulsion." Ibid. This same type of analysis is employed in Herold v. Parish Board, note 19 supra; State ex rel. Weiss v. District Board, note 19 supra.

25 The court's language at 405 suggests traditional sectarian analysis: "Inasmuch as the 'Holy Bible' is a Christian document, the practice aids and prefers the Christian religion." But the opinion at 406 indicates this was not the real basis of the decision. "The evidence adduced by Abington Township that several versions of the Bible and also the Jewish Holy Scriptures have been used proves only that the religion which is established is either sectless or is all-embracing, or that different religions are established equally. But none of these conditions, assuming them to exist, purges the use of the Bible as prescribed by the statute of its constitutional infirmities."

26 These arguments are used in People ex rel. Ring v. Board of Education, 245 Ill. 334 at 346, 92 N.E. 251 (1910), which has been interpreted as equating sectarianism with religion. See note, 9 VAND. L. REV. 84 (1956).

27 It is interesting to note that the Zorach decision is cited only once in the principal case. And this is with regard to plaintiff's standing to sue. Principal case at 403.

will be reached, for while the court here was able to rely on *McCollum* in support of its conclusion, a court intent upon reaching the opposite result would be equally justified in relying upon the basically different philosophy of *Zorach*. There is no outlook for uniformity of result unless the Supreme Court first clarifies its own position.

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