Constitutional Law - Whether State Action Requiring Public Schools to Begin Each Day with Readings from the Bible Violates the First Amendment

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should be cured by a Section 266 order except where fraud is perpetrated by the purchaser or his assignee. In other words, *ignorantia legis neminem excusat*—ignorance of the law is no defense.

If the foregoing viewpoint was adopted by the Supreme Court, it would be in compliance with the basic legislative intent manifested in Section 266 that tax deeds shall be "incontestable."

L. S. DOTSON

**Constitutional Law—Whether State Action Requiring Public Schools to Begin Each Day with Readings from the Bible Violates the First Amendment**—The two companion cases herein considered, *School District of Abington Township v. Schempp* and *Murray v. Curlett*, presented issues to the United States Supreme Court in the context of state enactments compelling public schools to begin each day with readings from the Bible.

In the *Schempp* case, a Pennsylvania statute required that:

At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

The children, who were Unitarians, attended a high school at which exercises were conducted pursuant to the statute. Selected students, supervised by teachers, read the passages. The statute as amended imposed no penalty upon a teacher refusing to obey its mandate. However, the possibility definitely existed that such a teacher would have his contract of employment terminated for violating the school laws. During the exercises, various different versions of the Bible were used. This was apparently done so as to show no favoritism toward any one particular religion. No comments or explanations were given and students and parents were notified that participation was not mandatory.

The parents of the children brought an action in equity to enjoin the practice created by the statute. At the trial, Edward Schempp, father of the students, testified that he decided against withdrawing his children from attending the exercises because he felt that the children’s relationships with

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3. The action was brought in 1958 before the amendment authorizing a child’s non-attendance at the exercises upon parental request. The District Court held the statute unconstitutional under both the Establishment Clause and the Free Exercise Clause. 177 F. Supp. 398. The statute was then amended and the judgment vacated and remanded for further proceedings. 364 U.S. 298, 81 Sup. Ct. 268, 5 L. Ed. 2d 89.
their teachers and classmates would suffer. The trial court, in deciding the issues of fact presented by the arguments of the litigants, held that the childrens’ attendance was compulsory, the exercises were compelled by law, and the readings were of a religious character and constituted a religious observance. In finding the statute violative of the “establishment clause” of the First Amendment as applied to the states by the due process clause of the Fourteenth Amendment, the trial court stated that the intention of the Commonwealth was to bring a religious ceremony into the public schools. The defendant school district, after being enjoined from enforcing the statute, appealed directly to the United States Supreme Court.

The Board of School Commissioners, in the Murray case, enacted a rule which provided “for the holding of opening exercises in the schools of the city consisting primarily of the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord’s Prayer.” The petitioners were professed atheists. At their insistence, the rule had been amended to allow children to be excused from the exercise on request of the parent.

Advantage had been taken of the amendment to the rule but the petitioners still felt that the rule as amended violated their constitutional right to freedom of religion. They brought a mandamus action in the Superior Court of Baltimore City, Maryland, to compel the rescission of the entire rule. The Superior Court rendered judgment for defendants and plaintiffs appealed. The Court of Appeals of Maryland affirmed and certiorari was granted by the Supreme Court of the United States.

In the majority opinion, the Supreme Court held that the practices at issue were unconstitutional under the “establishment clause” of the First Amendment, as applied to the states through the Fourteenth Amendment. It is interesting to note that in both cases, the parties argued violations pertaining to the “free exercise” of religion clause and not to the “establishment clause” of the First Amendment. Mr. Justice Stewart noted this fact in his opinion.

The majority opinion stressed the fact that religion is closely identified with our history and government. Our national existence reflects a highly religious people as shown by the continuance in oaths of office of the words “So help me God”; by the fact that each House of Congress has a chaplain who recites a prayer at the beginning of each session; and, in addition, the sessions of the United States Supreme Court are declared open by the crier in a ceremony, the final phrase of which invokes the grace of God.

This identification of religion with our history and government does not mean that religious freedom is not also as strongly imbedded in our public and private life. Each page of history tells of an experience of reli-

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5 Mr. Justice Stewart dissented with opinion.
DISCUSSION OF RECENT DECISIONS

religious persecution suffered by our ancestors whenever any single religion became associated with the government in power at the time. The Court reasoned that the federal government was placed in a neutral position by the First Amendment so as to avoid further religious persecution. As the Abington and Murray cases involved state action, before delving into the "neutral position theory," the Court briefly reiterated two basic doctrines: (1) the First Amendment had been made applicable to the States through the Fourteenth Amendment, and (2) the First Amendment forbids governmental legislation if its purpose is either the advancement or inhibition of religion. These two conclusions have been long recognized; these litigants did not question them.6

It was contended by the attorneys for the school district that failure to permit the exercises would give rise to a religion of secularism. While it is true that a State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility toward religion and thus preferring those who believe in no religion over those who do believe, the majority reasoned that failure to permit the exercises did not have that effect because study of the Bible as to its literary and historical qualities was not barred. As the majority opinion states, "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment."7 If the readings had been accompanied with literary and historic discussion and comments, they might have come within this exception.

The school district also contended that if the Court failed to permit the exercises, the majority's right to the free exercise of religion would be violated. The Court pointed out that the "free exercise" clause did not permit a majority to use the machinery of the State to practice its beliefs; the very purpose of the Bill of Rights was to withdraw certain subjects from political controversy and place them beyond the reach of majorities. Our political process by which our government officials are elected is not applicable to the subject of religion. The individual decides which religion, if any, he will follow. Allowing the majority to make this decision could only lead to suppression of minority religions.

The First Amendment states: "Congress shall make no law respecting an establiment of religion, or prohibiting the free exercise thereof. . . . " The two clauses contained in that amendment forbid two different kinds of governmental usurpation which in certain instances may overlap. The first clause does not permit the government to force religion or any form of worship on anybody. The second clause grants the right to the individual

to choose his own form of veneration. Situations arise whereby the enforce-
ment of one of the clauses creates a violation of the other clause. An ex-
ample of this is the military service. The Government supplies buildings
and materials for religious functions. The men in the armed services can-
not provide their own religious facilities. Failure to allow the Government
to supply the necessary materials would deprive the servicemen of their
right to follow their own religion. Such refusal might be considered as an
act hostile to religion. This delicate interrelationship was first discussed by
the court in *Cantwell v. Connecticut.* In that case the defendants, members
of Jehovah's Witnesses, were convicted of violating a state statute. The
statute provided that solicitation for any religious organization would not
be permitted unless approval had been given by the secretary of the state
public welfare council. The secretary would issue a license or certificate
if he found the cause to be a religious one. The Court held that allowing
the state to determine what is a religious cause places an undue burden
upon the exercise protected by the Constitution. It was further stated by
the court that:

The constitutional inhibition of legislation on the subject of reli-
gion has a double aspect. On the one hand, it forestalls compulsion
by law of the acceptance of any creed or the practice of any form of
worship. Freedom of conscience and freedom to adhere to such reli-
gious organization or form of worship as the individual may choose
cannot be restricted by law. On the other hand, it safeguards the free
exercise of the chosen form of religion. Thus the amendment em-
braces two concepts,—the first is absolute but, in the nature of
things, the second cannot. Mr. Justice Black, a few years later, stated that the First Amendment
"requires the state to be a neutral in its relations with groups of religious
believers and non-believers; it does not require the state to be their ad-
versary. State power is no more to be used so as to handicap religions
than it is to favor them." Later cases, such as *McCollum v. Board of
Education* and *Zorach v. Clauson,* considering the destructive religious
conflicts in history, affirmed this doctrine of separation of Church and
State.

In the *McCollum* case, religious teachers, employed by private religious
groups, were allowed to come into school buildings during the regular
hours set aside for secular teaching and substitute their religious teachings.
The facts showed that tax-supported property was being used for religious
instruction and that school authorities were cooperating with the religious
council. The Court held that the First Amendment clearly banned such

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8 310 U.S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940).
9 Id. at 303.
10 Everson v. Board of Education, 330 U.S. 1, at 18.
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action. On the other hand, the Zorach case concerned a "released time" program whereby public school students were permitted to leave the public school during the school day and go to religious centers for religious instruction or else stay in the public school classroom. This program did not involve the use of public schools nor the expenditure of public funds and therefore did not violate the establishment clause.

It would appear, therefore, that a recognition of the teachings of history coupled with the basic beliefs of the people as to freedom of religion caused the framers of the Constitution to incorporate within the document the First Amendment so as to avoid those situations of religious persecution which had occurred throughout the history of mankind. The Court in interpreting the phraseology of the First Amendment has placed the government in a neutral position in order to facilitate the enforcement of the First Amendment. This proposition appears theoretically trouble-free on its face, but difficulties arise when the Supreme Court has to deal with specific factual situations. The "establishment clause" prohibits the creation of any advances or inhibitions towards religion by the government and the "free exercise" clause allows every individual to freely choose his own course. When placing a legislative enactment beside the "establishment clause" to decide the statute's constitutionality, the Court must look to the purpose and practical effect of the enactment: if the purpose is either the advancement of inhibition of religion, then the government has strayed from its neutral position and the enactment exceeds the scope of legislative power as circumscribed by the Constitution. In a case involving the "free exercise" clause, a coercive effect as to the practice of religion is the violation of constitutional rights. However, the "establishment clause" may be violated without the presence of any coercion. The creation of the advance or inhibition violates the Constitution.

The previously stated principles were so well recognized that the Supreme Court without the citation of a single case reaffirmed them in Engel v. Vitale. At issue in that case was a twenty-two word prayer recited each morning in the public schools. The Court in a six to one decision declared the practice unconstitutional. This was the first instance where a state actually composed a prayer and then inserted the prayer into one of its compulsory institutions. The majority opinion stated that in the light of history the prohibition against governmental establishment of religion meant that the government was without authority to prescribe an official prayer as such prescription violated the establishment clause of the First Amendment. In discussing the two clauses of the First Amendment, the majority opinion stated:

Although these two clauses may in certain instances overlap, they

13 Mr. Justice Stewart dissented. Justices Frankfurter and White did not participate in the decision.
forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.\textsuperscript{14}

The state laws in the \textit{Abington} and \textit{Murray} cases fall directly within the scope of the decision of Engel. The opening exercises were in the nature of religious ceremonies. Any possible argument as to the nature of the readings can be completely abrogated simply by pointing to the fact that the readings, without comment, were taken from the Bible, which is undeniably an instrument of religion. Furthermore, the activities were considered part of the curriculum of the students who were required by law to attend school. The prayers were read in the school building under the supervision and participation of instructors employed in those schools.\textsuperscript{15} The Court concluded that the facts showed that the state statutes were establishing a religious service.

Mr. Justice Douglas, in his concurring opinion, in addition to his remarks pertaining to the discussion of the majority opinion, noted that through the mechanism of the State, all of the people were being required to finance a religious exercise and the most effective way to establish any institution is, of course, to finance it.

Mr. Justice Brennan, in a very long concurring opinion, reviewed the historical background pertinent to the problems arising under the First Amendment. He upheld the distinction between the \textit{McCollum} and \textit{Zorach} cases, stating that the McCollum program placed the religious instructor in the same position as that held by the teacher of secular subjects while the Zorach program did not.\textsuperscript{16}

Mr. Justice Goldberg, in a concurring opinion joined by Mr. Justice Harlan, considered the exercises to be of such a nature as to exclude the readings from being characterized as accommodation by the state in the interests of religious liberty.

The dissent, written by Mr. Justice Stewart, emphasized the state's

\textsuperscript{14} Engel v. Vitale, \textit{supra} note 12, at 430-431, 82 Sup. Ct. at 1267, 8 L. Ed. 2d at 603.
\textsuperscript{15} The fact that the State was financing the exercises brings the case within the scope of the \textit{McCollum} decision.
\textsuperscript{16} Mr. Justice Brennan's opinion distinguishes the "Sunday Law" Cases from the cases at hand on the basic ground that the "Sunday Laws," although first enacted for religious ends, continued in force for reasons wholly secular. The laws here being considered were enacted for religious purposes.
position and appears to concern itself with the rights of the majority only.\textsuperscript{17} He stated that the statutes in question authorizing religious exercises in public schools should be considered as measures making possible the free exercise of religion; for the government to be truly neutral, it should permit exercises for those who want them and failure to allow the exercises places religion at an artificial and state-created disadvantage. He concluded by stating that the evidence did not show that children were under any form of coercion to participate and therefore the cases should have been remanded to the lower courts to make findings on the question of coercion.

In answer to Mr. Justice Stewart, the majority opinion clearly indicated that the machinery of the State should not be used for religious purposes. The fact that a majority of the population desires such exercises does not give them the right to impose their will upon the minority. Allowing them to do so could create religious disturbances. That was the effect of such action in other times in history. Another factor to be remembered is that religious freedom can be and should be practiced in institutions not affiliated with the government. As previously stated, the element of coercion is not necessary in order to show a violation of the establishment clause.

It is obvious that this decision did not settle completely the question as to the application of the First Amendment as interpreted by the Court. While it may now appear obvious that recitation of prayers in a public school violates the First Amendment, the interpretation and general principles set down by the Court in this decision may not lend themselves to other and varied situations. For instance, one future problem pertains to the military service. The federal government provides buildings for religious services for men in the armed services. Would this type of government regulation be considered a violation of the First Amendment?\textsuperscript{18} Another problem concerns the distinction between the study of religion and religious ceremonies. While religious ceremonies will not be permitted in public schools, the Court did state that the study of religion would not constitute a violation of the Establishment Clause. At first blush it would appear that the two are obviously different in nature. Yet when one considers that the study of religion is usually connected with the complete indoctrination of an individual into a religion and that while such studies may not be religious services as such but may be part of a program to establish a religion, the problem does begin to come to the surface.

It is now apparent that the State may not attempt to create a religious

\textsuperscript{17} Mr. Justice Stewart restated in greater detail the position he took in Engel v. Vitale where he was also the lone dissenter.

\textsuperscript{18} The Court, in a note in the Schempp case stated, “We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.” 83 Sup. Ct. 1560, 1578.
aura, or advance or inhibit any religion. The realm of religion is set off from the political structure. The secular must remain apart from the religious. So long as the governments, both Federal and State, remain neutral, we can maintain and fully exercise the right to choose and follow our own religion.

G. COHEN

PATENT ACQUISITION—VIOLATION OF SHERMAN ANTITRUST LAW—One of the most difficult areas of corporate law practice involves advising the client so as to prevent violations of the Antitrust laws. This problem becomes more complicated when the client notifies his attorney that he wants to acquire patents from his competitors. In this patent-antitrust area we immediately encounter what seems to be a conflict of concepts since the patent law specifically authorizes the acquisition of patents, which necessarily involves the acquisition of a legal monopoly. Yet the antitrust law prohibits "... every person who shall monopolize or attempt to monopolize."2

Thus, in the recent decision of United States v. Singer Mfg. Co.,8 the Supreme Court found that Singer had exceeded the limitations of the Sherman Act. In this case the lower court had dismissed the Government's civil antitrust suit against Singer, finding non-meritorious the Government's claim of an alleged violation of sections 1 and 2 of the Sherman Antitrust Act by a conspiracy and combination to exclude the Japanese from their importation and sale of infringing zig-zag sewing machines.

FACTS OF THE CASE

After an Italian sewing machine manufacturer, Necchi, had demonstrated a definite U.S. market for a household zig-zag sewing machine, Singer, as well as many foreign manufacturers, put its staff to work to develop a simplified sewing machine mechanism capable of automatically producing zig-zag and various ornamental patterns. By 1954, Singer had developed several such machines, was producing them and had filed two

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1 The U.S. Const. Art. I, Sec. 8 authorizes Congress to "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their . . . Discoveries." Under the patent Code, 35 U.S.C. 101, whoever "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent . . . ." Section 154 provides that a patent shall contain a grant "of the right to exclude others from making, using, or selling the invention throughout the United States" for the term of seventeen years.

2 The Sherman Act, Sec. 1, 26 Stat. 209 (1890), 15 U.S.C. 1 et seq. (1959) prohibits: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or foreign nations . . . ." Section 2 further prohibits "Every person who shall monopolize or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations. . . ."

3 371 U.S. 918, 10 L. Ed. 2d 823 (1963).