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Constitutional Law—Separation of Church and State and the Application of the First Amendment to State Powers

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A taxpayer and parent sued to enjoin the Nashville Board of Education from continuing the practice of reading from the Bible each day in the public schools in compliance with a Tennessee statute. The trial court sustained defendant's demurrer (no cause of action). *Held:* affirmed,[1] on the grounds that the statute[2] was not in conflict with either the Tennessee Constitution[3] or with the United States Constitution, Amendment I.[4]

By decisions before 1868, individuals were not protected against state action in violation of the Bill of Rights of the United States Constitution,[5] including the first amendment.[6] The privileges and immunities clause[7] of the fourteenth amendment adopted in 1868 did not secure to individuals as state citizens the privileges and immunities of United States citizens as enumerated in the first eight amendments.[8] However, the due process clause[9] of the four-

[1] Carden v. Bland, 228 S.W.2d 718 (Tenn. 1956).

[2] Tenn. Code Ann. § 49-1307(4) (Supp. 1955).

[3] Art. I, § 3:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

[5] Withers v. Buckley, 61 U.S. (20 How.) 84 (1857), Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), and see Fox v. Ohio, 46 U.S. (5 How.) 410 (1847), fifth amendment; Smith v. Maryland, 59 U.S. (18 How.) 71 (1855), fourth amendment; Twitchell v. The Commonwealth, 74 U.S. (7 Wall.) 321 (1868), sixth amendment; Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833), seventh amendment; and, Permear v. The Commonwealth, 72 U.S. (5 Wall.) 475 (1866), eighth amendment.

[6] Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845).

[7] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

teenth amendment protected state citizens against deprivation of their liberties by the several states.[10] There were also certain special privileges or immunities that could not be abridged by the states.[11]

It is now held that the first amendment applies to the states through the fourteenth amendment.[12] This application is no longer accomplished through the due process clause. The federal question is no longer how power is exercised by a state, but whether the state has any power to act in the particular field in question. With the repudiation of the federal substantive due process doctrine, the application of the due process clause is restricted to procedural questions.[13] The first amendment must apply, then, through the privileges and immunities clause of the fourteenth amendment.[14]

The state cases have been slow to take up the federal issue. Where Bible reading has been litigated, the determinative law has been the state constitution, and the weight of authority has per-

[8] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); accord Presser v. Illinois, 116 U.S. 252 (1886), second amendment; Twining v. New Jersey, 211 U.S. 78 (1908), and Hurtado v. California, 110 U.S. 516 (1884), fifth amendment; West v. Louisiana, 194 U.S. 258 (1904), and Maxwell v. Dow, 176 U.S. 581 (1900), sixth amendment; Walter v. Sauvinet, 92 U.S. 90 (1875), seventh amendment; and, see O'Neil v. Vermont, 144 U.S. 323 (1892), eighth amendment. There is apparently no authority for this proposition as applied to the first, third, or fourth amendments.

[9] ". . . [N]or shall any State deprive any person, of life, liberty, or property, without due process of law; . . ."

[10] Fiske v. Kansas, 274 U.S. 380 (1927), and see Gitlow v. New York, 268 U.S. 652 (1925), liberty of expression; De Jonge v. Oregon, 299 U.S. 353 (1937), liberty of peaceable assembly; Near v. Minnesota, 283 U.S. 697 (1931), liberty of the press.

[11] E.g. peaceable assembly: Hague v. CIO, 307 U.S. 496 (1939); and see Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872).

[12] Murdock v. Pennsylvania, 319 U.S. 105 (1943); accord Saia v. New York, 334 U.S. 558 (1948), and Thomas v. Collins, 323 U.S 516 (1945), freedom of speech; West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), freedom of exercise of religion; McCollum v. Board of Education, 333 U.S. 203 (1948) and see Everson v. Board of Education, 330 U.S. 1 (1947), freedom from establishment of religion.

[13] West Coast Hotel Co. v. Parrish, 330 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

[14] That the privileges and immunities of state citizens are at least those of United States citizens as found in the first eight amendments is not a modern notion. See Rochin v. California, 342 U.S. 165, 174 (1952), Mr. Justice Black concurring; Beauharnais v. Illinois, 343 U.S. 250, 267 (1952), and Adamson v. California, 332 U.S. 46, 68 (1947), Justices Black and Douglas dissenting; Adamson v. California, supra, 123 (1947), Mr. Justice Murphy dissenting; Maxwell v. Dow, 176 U.S. 581, 605 (1900), O'Neil v. Vermont, 144 U.S. 323, 337 (1892), and Hurtado v. California, 110 U.S. 516, 538 (1884), Mr. Justice Harlan dissenting; and, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (1872), Mr. Justice Field dissenting.

mitted Bible reading in the public schools.[15] The more recent cases involve the first amendment, but the majority hold Bible reading constitutional under both the state and Federal Constitution.[16] It is submitted that with but one notable exception[17] the rationale has been stare decisis rather than the first amendment.

It is submitted that in the instant case prior state court decisions are irrelevant because the first amendment controls.[18] An immunity of a citizen of the United States is to be free from any law respecting an establishment of religion.[19] The fourteenth amendment entitles the citizens of each state to that immunity.[20] The prohibition of establishment of religion means at least separation of Church and State,[21] on public school property.[22] The instant case presents a commingling of Church and State within the school building under state law, contrary to the prohibition of the first amendment. It is submitted that the case is wrong and should be overruled.

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[15] Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922); Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908); Hackett v. Brooksville Graded School District, 120 Ky. 608, 87 S.W. 792 (1905); Billard v. Board of Education, 69 Kan. 53, 76 Pac. 422 (1904); Pfeiffer v. Board of Education, 118 Mich. 560, 77 N.W. 250 (1898); Stevenson v. Hanyon, 7 Pa. Dist. 585 (1898); Nessle v. Hum, 1 Ohio N.P. 140, 2 Ohio Dec. N.P. 60 (Mahoning County Court of Common Pleas, 1894); Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Spiller v. Woburn, 94 Mass. (12 Allen) 127 (1886); Donohoe v. Richards, 38 Me. 379, 61 Am. Dec. 256 (1854); and see Lewis v. Board of Education, 285 N.Y.S. 164, 157 Misc. 520 (1935), modified 286 N.Y.S. 174, 247 App. Div. 106 (1936), appeal dismissed 276 N.Y. 490, 12 N.E. 2d 172 (1937); Knowlton v. Baumhoner, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918); and State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902), *aff'd on rehearing*, 65 Neb. 876, 93 N.W. 169 (1903). Contra, State v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929); Herald v. Parish Board, 136 La. 1034, 68 So. 116 (1915); People v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910); and State v. District Board, 76 Wisc. 177, 44 N.W. 967 (1890).

[16] Carden v. Bland, 288 S.W.2d. 718 (Tenn. 1956); Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950), dismissed (want of jurisdiction), 342 U.S. 429 (1952); People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610, 612 (1927; Kaplan v. Independent School District, 171 Minn. 142, 214 N.W. 18 (1927). But see Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952). But cf. Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U. S. 816 (1954).

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

[18] U.S. Const., Art. VI, cl. 2:
"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[19] U.S. Const., Amend. I, supra note 4.

[20] See note 7 supra.

[21] McCollum v. Board of Education, 333 U.S. 203 (1948).

[22] See Zorach v. Clausen, 343 U.S. 306 (1952).