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## Constitutional Law - Church and State - Statute Requiring Religion to be Taken Into Consideration in Adoption

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CONSTITUTIONAL LAW—CHURCH AND STATE—STATUTE REQUIRING RELIGION TO BE TAKEN INTO CONSIDERATION IN ADOPTION—In 1951, a Jewish couple obtained custody of illegitimate twins who were then two weeks old. In 1954, the couple formally sought to adopt the children. Although petitioners were otherwise qualified to act as parents, a Massachusetts statute provides that “in making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child.”<sup>1</sup> The twins’ natural mother was Catholic but had consented in writing to adoption by the petitioners and to rearing of the children in the Jewish faith. The lower court found that several Catholic couples had filed applications with the Catholic Charities Bureau to adopt Catholic children of the age of the twins, and thus that it was “practicable” to “give custody only to persons” of Catholic faith. On appeal, *held*, affirmed. The statute does not violate the First Amendment<sup>2</sup> since it treats all religions alike and does not require, prevent or hamper any exercise of religion. The mother’s interest was only that the babies were in a good home; she permitted rather than commanded the adoption. *Petitions of Goldman*, (Mass. 1954) 121 N.E. (2d) 843, cert. den. 348 U.S. 942, 75 S.Ct. 363 (1955).

Although the Supreme Court has dealt with numerous cases involving religious freedom in recent years, the principal case lies in an area of church-state relations upon which it has not yet passed. However, no less than 43 jurisdictions have statutes similar to that of Massachusetts, although there has been no interpretation of these statutes in 34 of them.<sup>3</sup> In spite of the fact that the initial reaction may indicate that such statutes are unconstitutional, it would seem unwise to apply strictly the metaphorical “wall of separation”<sup>4</sup> to this area of church and state.<sup>5</sup> A holding that the state in adoption proceedings can

<sup>1</sup> Mass. Laws Ann. (Supp. 1952) c. 210, §5B.

<sup>2</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST., amend. I.

<sup>3</sup> 54 COL. L. REV. 376 (1954) (pp. 396-403, for the types and scope of these statutes; pp. 376-377, for interpretations given to some of these statutes). See also 22 A.L.R. (2d) 696 (1952); 23 A.L.R. (2d) 701 (1952); 28 IND. L.J. 401 (1953); 59 YALE L.J. 715 (1950).

<sup>4</sup> See *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504 (1947); *McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461 (1948).

<sup>5</sup> It should be noted that in spite of the fact that such statutes limit the number of children that a prospective parent may adopt, they do not interfere with the person’s freedom of religious belief.

give no consideration to a child's religion would be just as much a selection of the child's religion as if the state would strictly follow the statute. In either case the family into which the state puts the child will largely determine its religion.<sup>6</sup> This problem cannot be viewed in the vacuum of the separation doctrine; here state and church necessarily overlap.<sup>7</sup> The "wall of separation" was designed to promote religious freedom, but it is not synonymous with that freedom.<sup>8</sup> Nothing in the Constitution or its interpretation indicates that there should be a strict application of this doctrine.<sup>9</sup> In fact, in *Zorach v. Clauson*<sup>10</sup> it is pointed out that cooperation between church and state is in accord with American tradition. It has also been suggested that the interest of religious freedom should be balanced against the interest of the state.<sup>11</sup> In the principal case the statute does not interfere with freedom of religion, but actually encourages it "as far as practicable" by letting the natural parent select the child's religion rather than leaving it to inadvertency.<sup>12</sup> Attention to the child's religion would likewise further a legitimate state interest in promoting family homogeneity by avoiding those conditions which may prove disruptive of the child's development. This consideration was not applicable to the principal case because the twins were very young. It is also questionable whether the establishment clause of the First Amendment was intended to do any more than prohibit the institution of a state religion<sup>13</sup> and whether the due process clause of the Fourteenth Amendment makes the establishment clause applicable to the states.<sup>14</sup>

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<sup>6</sup> Generally the parent has the right to direct the child's religious education. 39 AM. JUR., Parent and Child §50 (1942).

<sup>7</sup> See Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 (1954). *Contra*, PFEFFER, CHURCH, STATE, AND FREEDOM (1953).

<sup>8</sup> PARSONS, THE FIRST FREEDOM 106 (1948); Keehn, "Church-State Relations," SOCIAL ACTION, p. 31, Nov. 15, 1948.

<sup>9</sup> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306 at 312, 72 S.Ct. 679 (1952). See also Justice Reed's dissent in *McCullum v. Board of Education*, note 4 *supra*; 3 STORY, COMMENTARIES ON THE CONSTITUTION §1874 (1833).

<sup>10</sup> Note 9 *supra*.

<sup>11</sup> Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 (1954). See also Kauper, "The First Ten Amendments," 37 A.B.A.J. 717 (1951) for an expression of the same idea.

<sup>12</sup> Neither does it take away the right of the adopting parents to select the child's religion. Thus it gives the greatest possible amount of freedom to both the natural and adopting parent. If the statute were used to defeat the parent's intent after the parent had consented to the child's upbringing in another religion, there would be a greater question of constitutionality. The court in the principal case, however, construed the consent to be merely permissive and not mandatory.

<sup>13</sup> COOLBY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, 3d ed., 224-225 (1898); PARSONS, THE FIRST FREEDOM 41 (1948); Corwin, "The Supreme Court as a National School Board," 14 LAW & CONTEMP. PROB. 3 at 10 (1949).

<sup>14</sup> Meyer, "The Blaine Amendment and the Bill of Rights," 64 HARV. L. REV. 939 (1951); Corwin, "The Supreme Court as a National School Board," 14 LAW & CONTEMP. PROB. 3 (1949); 22 SO. CAL. L. REV. 423 (1949).