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CONSTITUTIONAL LAW-JUDCIAL POWERS-STATE TAXPAYER DENIED STANDING AS PARTY IN INTEREST IN BIBLE READING CASE

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CONSTITUTIONAL LAW—JUDICIAL POWERS—STATE TAXPAYER DENIED STANDING AS PARTY IN INTEREST IN BIBLE READING CASE—Plaintiffs sought a judgment to declare unconstitutional a New Jersey statute which required the reading of five verses of the Old Testament at the opening of each day in the public schools.[1] Plaintiffs contended that the practice under the statute was an "establishment of religion" prohibited by the First Amendment[2] and applicable to the several states through the "due process" clause of the Fourteenth Amendment. Both plaintiffs were taxpayers of New Jersey, and one was also the parent of a child who had attended a public school, but had left school before the appeal was taken. The Supreme Court of New Jersey held that the law was constitutional.[3] On appeal, *held*, dismissed, three justices dissenting. The dispute is not a "case or controversy" within the jurisdiction of the Supreme Court of the United States. *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394 (1952).

Article III of the United States Constitution restricts the jurisdiction of federal courts to questions which are presented in the form of a "case or controversy."[4] Thus, the Court will not pass upon the constitutionality of legislation unless adverse parties have a substantial interest in an actual controversy.[5] These concepts which have been developed to apply the "case or controversy" limitation have a flexibility which permits the Court to refuse jurisdiction in some instances when it feels that the particular facts do not present a fair test of the constitutional question in issue.[6] Such use of this procedural device as a reflection of judicial attitude toward the manner of deciding substantive legal questions is illustrated by the principal case. Both of the plaintiffs are denied standing as taxpayers because they can show no "measurable appropriation or disbursement of school-district funds" resulting from the practice of Bible reading.[7] One plaintiff is denied standing as the parent of a school child because the child was graduated from school when the appeal was taken; the question is moot, there-

[1] N.J. Rev. Stat. (1937) §18:14-77.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. AMEND. I.

[3] Doremus v. Board of Education, 5 N.J. 435, 75 A. (2d) 880 (1950). Bible reading in public schools has been widely litigated in state courts under varying state constitutional provisions. Cases collected, 141 A.L.R. 1145 (1942); see 2 STOKES, CHURCH AND STATE IN THE UNITED STATES 549 (1950); TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 244 (1948).

[4] Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 (1911).

[5] Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 at 241, 57 S.Ct. 461 (1937).

[6] HARRIS, THE JUDICIAL POWER OF THE UNITED STATES 35 (1940).

[7] Principal case at 397.

fore, so far as any injury to the parent or child, because of the allegedly unconstitutional practice, is concerned.[8] The dissent in the principal case would give the plaintiffs standing as taxpayers, contending that if the Bible reading is an "establishment of religion" then there is a mismanagement of the tax supported schools.[9] The division of the Court is upon the propriety of a state taxpayers' suit in this particular context. It is clear that a federal taxpayer would not have sufficient interest in the expenditure of federal treasury funds to challenge a comparable federal law unless he could show some injury not suffered in common with other taxpayers.[10] State taxpayers' suits, however, usually present a "case or controversy" when state expenditures are in issue in a federal court.[11] Because precedent would seem to justify jurisdiction in the principal case, it is believed that the denial of jurisdiction is significant as an avoidance of the substantive constitutional question of whether Bible reading under state law is an "establishment of religion." In the *Everson*[12] and *McCollum*[13] cases, the Court stated the constitutional prohibition against an "establishment of religion" in language so broad[14] that virtually any state law which related religion and public education could be invalid under it.[15] In each of these cases there was a substantial interest urging unconstitutionality of the alleged "establishment of religion." In the *Everson* case, the complaining taxpayers' money was being taken from the school district fund to provide transportation for children attend-

[8] Principal case at 396, citing United States v. Alaska Steamship Co., 253 U.S. 113, 40 S.Ct. 448 (1920).

[9] Principal case at 398.

[10] Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597 (1923). As to when a federal taxpayer will have sufficient interest see United States v. Butler, 297 U.S. 1, 56 S.Ct. 312 (1936).

[11] Crampton v. Zabriskie, 101 U.S. 601 (1879); Cf. Frothingham v. Mellon, supra note 10 at 487; standing to a state taxpayer was denied in Williams v. Riley, 280 U.S. 78, 50 S.Ct. 63 (1929). The majority of state courts allow a taxpayer to question the constitutionality of state practices. Page v. King, 285 Pa. 153, 131 A. 707 (1926); cases collected 174 A.L.R. 549 (1948). *Contra,* denying a taxpayer standing to question the constitutionality of an appropriation to a denominational college, Bull v. Stichman, 273 App. Div. 311, 78 N.Y.S. (2d) 279 (1948), affd. 298 N.Y. 516, 80 N.E. (2d) 661 (1948), noted 17 FORDHAM L. REV. 107 (1948).

[12] Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947).

[13] McCollom v. Board of Education, 333 U.S. 203, 68 S.Ct. 461 (1948).

[14] "The 'establishment of religion' clause of the First Amendment means at least this: 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 religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups. . . ." Everson v. Board of Education, 330 U.S. 1 at 15, 67 S.Ct. 504 (1947).

[15] Dissenting opinion of Reed, J., McCollom v. Board of Education, supra note 13 at 240; opinion of Desmond, J., Zorach v. Clauson, 303 N.Y. 161, 100 N.E. (2d) 463 (1951).

ing parochial schools.[16] In the *McCollum* case, the complainant objecting to the religious education program conducted in a public school was the parent of a child attending the school.[17] Had jurisdiction been accepted in the principal case, however, the New Jersey statute, representing the interest of the state in educating its citizens, would have been balanced against only the abstract constitutional prohibition against an "establishment of religion," and not against any actual injury suffered because of the Bible reading. The result of the principal case, therefore, seems to be that the interest of the state will be weighed upon the constitutional scales only if there is a real injury alleged as limiting such interest. Although this decision fails to answer a serious constitutional question,[18] it is a welcome indication that the Supreme Court recognizes the responsibility of the great power it assumed as a "National School Board."[19]

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[16] Supra note 12.

[17] Supra note 13.

[18] In effect, if not in theory, a substantive constitutional question may be decided by denying standing to sue. Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300 (1938), noted 51 HARV. L. REV. 897 (1938). If some injury can be shown, a parent would probably have standing to sue under facts comparable to those of the principal case. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943). In the principal case no injury was even alleged, principal case at 396.

[19] The Court's assumption of power is criticized by Corwin, "The Supreme Court as a National School Board," 14 LAW AND CONTEM. PROB. 1 (1949); in support of such assumption see Pfeffer, "Church and State: Something Less than Separation," 19 UNIV. CHI. L. REV. 1 (1951).