Michigan Law Review

Volume 36 | Issue 3

1938

CONSTITUTIONAL LAW - RELIGIOUS FREEDOM - COMPULSORY SALUTE AND PLEDGE OF ALLEGIANCE TO FLAG BY SCHOOL CHILDREN -VALIDITY

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CONSTITUTIONAL LAW — RELIGIOUS FREEDOM — COMPULSORY SALUTE AND PLEDGE OF ALLEGIANCE TO FLAG BY SCHOOL CHILDREN — VALIDITY — A Massachusetts statute [1] imposed a duty upon each public school teacher to lead his pupils, at least once each week, in a salute and pledge of allegiance to the flag.[2] Petitioner was in his third year as a pupil in the public schools, and, in obedience to his father's commands, refused to participate in the salute and pledge. For such refusal, the school committee expelled the petitioner from the school, and he thereupon submitted a petition for a writ of mandamus, to compel his readmission to the school. *Held*, that the writ be denied, inasmuch as the statute did not infringe on constitutional provisions [3] providing for religious freedom. *Nicholls v. Mayor and School Committee of Lynn*, (Mass. 1937) 7 N. E. (2d) 577.

The great majority of the state constitutions contain provisions, in various forms, which purport to safeguard the religious liberty of the people.[4] "The constitution of the United States makes no provision for protecting citizens of the respective states in their religious liberties; nor does it impose any inhibition

[1] Mass. Acts (1935), c. 258, p. 306.

[2] The form of the pledge was as follows: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."

[3] These constitutional provisions were in the following form: Declaration of Rights of the Massachusetts Constitution, Art. II, "No subject shall be hurt, molested, or restrained in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship."

Amendments, Art. XLVI, Sec. 1,—"No law shall be passed prohibiting the free exercise of religion."

[4] For a cursory summary of such provisions, see 12 C. J. 942 (1917).

in this respect on the states. That is a matter left exclusively to the state constitutions and laws enacted in pursuance thereof." [5] Suffice it to say, that the decisions in this field of the law have dealt mainly with the construction and interpretation of state constitutional provisions.[6] The courts' interpretations of these provisions with regard to religious liberty in the schools have not always been uniform.[7] Thus, laws requiring or providing for the reading of the Holy Bible in public schools, attendance of the pupils being optional, have generally been held valid; [8] but where there is no provision for the optional withdrawal of pupils from the readings there is some disagreement as to the constitutionality of the law.[9] Provisions requiring vaccination of school children have been uniformly sustained over objections that such provisions infringed on religious freedom, on the ground that reasonable health regulations are valid even though such regulations happen not to conform to some religious beliefs.[10] Compulsory military service at a state university has likewise been sustained by a recent decision.[11] It would appear that the courts, in dealing with these cases on religious freedom in the schools, have been guided by certain judicially determined principles which have been developed in the decisions dealing with

[5] Brunswick-Balke-Collander Co. v. Evans, (D. C. Ore. 1916) 228 F. 991 at 997. See also People v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910). Whether due process under the Fourteenth Amendment is a guarantee of religious liberty against state invasion has not yet been decided.

[6] On religious liberty generally, see: Hartogensis, "Denial of Equal Rights to Religious Minorities and Non-believers in the United States," 39 YALE L. J. 659 (1930); Zollman, "Religious Liberty in the American Law," 17 MICH. L. REV. 355, 456 (1919); 15 COL. L. REV. 704 (1915).

[7] On sectarianism in the schools, see the cases noted in 57 A. L. R. 195 (1928); 31 A. L. R. 1125 (1924); 20 A. L. R. 1351 (1922); 5 A. L. R. 866 (1920).

[8] Lewis v. Board of Education, 157 Misc. 520, 285 N. Y. S. 164 (1935); Kaplan v. School District, 171 Minn. 142, 214 N. W. 18 (1927); People v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S. E. 895 (1921); Church v. Bullock, 104 Tex. 1, 109 S. W. 115 (1908); Hackett v. Brooksville School District, 120 Ky. 608, 87 S. W. 792 (1905); Billiard v. Board of Education, 69 Kan. 53, 76 P. 422 (1904); Pfeiffer v. Board of Education, 118 Mich. 560, 77 N. W. 250 (1898). *Contra*: State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N. W. 967 (1890). Note also sec. 18 of the Mississippi Constitution which reads as follows: "The rights hereby secured shall not be construed . . . to exclude the Holy Bible from use in any public school of this state."

[9] Those cases holding the law invalid are: Herald v. Board of School Directors, 136 La. 1034, 68 So. 116 (1915); People v. Board of Education, 245 Ill. 334, 92 N. E. 251 (1910); State v. Scheve, 65 Neb. 853, 91 N. W. 846 (1902). Those cases holding the law valid are: Nessle v. Hum, 2 Ohio Dec. 60 (1894); Donahoe v. Richards, 38 Me. 379 (1854). Notice the interesting case of Board of Education v. Minor, 23 Ohio St. 211 (1872), where a resolution which forbade the reading of the Holy Bible in the public schools was upheld.

[10] State v. Drew, (N. H. 1937) 192 A. 629; Vonnegut v. Baun, 206 Ind. 172, 188 N. E. 677 (1934); New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S. W. 303 (1918). On general legal aspects of vaccination, see 93 A. L. R. 1413 (1934); 17 L. R. A. (N. S.) 709 (1909).

[11] Hamilton v. Regents, 293 U. S. 245, 55 S. Ct. 197 (1934).

religious freedom generally. These principles which have defined the extent of the legislative department's power to infringe upon personal religious freedom, are two in number: (1) There must be a clear showing that the legislation complained of is a real religious infringement, in order to have such legislation declared invalid; [12] and (2) even though such clear showing is made, the legislation will be sustained if it is reasonably necessary to the well-being, good order, and safety of the state.[13] It would appear that the holding of the principal case is in accordance with these principles,[14] and is also in accordance with the distinct weight of authority.[15]

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[12] "We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system." Matter of Frazee, 63 Mich. 396 at 405, 30 N. W. 72 (1886). "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character." Davis v. Beason, 133 U. S. 333 at 342, 10 S. Ct. 299 (1890).

[13] State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1925) (use of narcotics for sacramental purposes prohibited); Commonwealth v. Kneeland, 37 Mass. 206 (1838) (blasphemy prohibited); Mormon Church v. United States, 136 U. S. 1, 10 S. Ct. 792 (1889) (bigamy prohibited).

[14] That is to say, it is difficult to see how a compulsory pledge of allegiance to the flag is a real religious infringement. Furthermore, even if it be conceded that the compulsory pledge is a real religious infringement, it might still be sustained on the grounds that it is reasonably necessary to the good order, safety, and well-being of the state.

[15] Leoles v. Lander, (Ga. 1937) 192 S. E. 218; Hering v. State Board of Education, 117 N. J. L. 455, 189 A. 629 (1937); Hardwick v. Board of School Trustees, 54 Cal. App. 696 at 711, 205 P. 49 (1921) (dictum). It is interesting to note that the Commissioner of Education of New Jersey in 1912 rendered a finding in which a compulsory pledge of allegiance to the flag was declared invalid on the grounds that a "Board of Education has no right to ask a child to pledge allegiance to the flag of a country of which he is not a citizen." See, Temple v. Board of Education of Cedar Grove, Annual School Report of N. J., 129 at 130 (1912). Presumably, this finding has been overruled by the New Jersey decision cited above.