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CONSTITUTIONAL LAW

RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS

New Mexico. Plaintiffs, as taxpayers, brought an action in an attempt to end the teaching of religious beliefs by Catholic sisters in a State-supported school and, among other things, to prohibit the sisters from teaching in their religious robes. The religious instruction period was made a part of the regular school day, and the buses which brought the children to the schools were operated on a schedule which allowed the instruction to be given. The New Mexico Supreme Court upheld the judgment of the district court and ordered that those teachers who violated their orders and engaged in religious teaching should be forbidden to teach again in the public schools of the State.[1]

This case was the result of a long and involved religious and educational disagreement involving several schools in New Mexico. The case involved numerous points and fact situations too detailed to be mentioned here.

The case is another judicial statement that Church and State must not pool resources or confuse or intermingle their powers. The New Mexico court had a rather clear case before it here, for religious instruction was being given to children by members of a religious organization in a building supported by public money. The court expressed some doubt concerning the degree of religious instruction permissible in public schools. After expressing the hope that the United States Supreme Court would answer that question, the New Mexico court made the following statement:

> We think it better to await their decision than to announce a rule on the subject at this time. However, we take this occasion to say that while we oppose the teaching of sectarian religion or the giving of control of the state or any of its agencies to any sect or combination of sects, yet we know religion itself is so intermingled in the

[1] .....N. M....., 236 P. 2d 949 (1951).

> daily life of our people and in the administration of and in the affairs of state that no wall of absolute separation of religion and state can be maintained—but few would want it.[2]

Support for this attitude is found in the opinion delivered by Mr. Justice Douglas in the case of *Zorach v. Clauson*,[3] decided April 28, 1952. The Justice said there:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. . . . Policemen who helped parishioners into their places of worship would violate the Constitution.

The *Zorach* case involved a different set of facts altogether, however. There, children desiring to do so were excused from school to attend religious training at another place, such instruction being given by sectarian teachers. Children not wishing to participate in such training were kept at school, although formal instruction was suspended during this period. The election was voluntary, but once the choice to receive religious instruction was made, records were kept by the school of absences from the religious training. The Court upheld the program, Justice Douglas stating that ". . . [the State government] can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction."[4]

Justice Frankfurter, in a vigorous dissent, criticized the decision and lamented the fact that a public instrumentality, the school, was being utilized as a method of supplying students to a religious training program, although perhaps the utilization was not direct. The Justice also disapproved of the decision on the ground that the petitioners were not allowed to show that actual coercion was used upon parents and children to secure the attendance of the

[2] 236 P. 2d at 968.
[3] 72 S. Ct. 679, 683.
[4] *Id.* at 684.

children at the religious instruction. Justice Frankfurter was of the opinion that it was entirely possible that some form of moral coercion could be inherently present in the system as it was operated. The dissent of Mr. Frankfurter concludes with this interesting paragraph:

> The deeply divisive controversy aroused by the attempts to secure public school pupils for sectarian instruction would promptly end if the advocates of such instruction were content to have the school "close its doors or suspend operations"—that is, dismiss classes in their entirety, without discrimination—instead of seeking to use the public schools as the instrument for security of attendance at denominational classes. The unwillingness of the promoters to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes—an attitude that hardly reflects the faith of the greatest religious spirits.[5]

Justice Jackson, in a dissent, opined that the *Zorach* judgment "will be more interesting to students of psychology and of the judicial processes than to students of constitutional law," his belief being that the "wall which the Court was professing to erect between Church and State [in the *McCollum v. Board of Education* case[6]] has become even more warped and twisted" than he had expected.

The *McCullom* decision was also utilized by Justice Black in his dissent in the *Zorach* case. Likewise, the New Mexico Supreme Court, in the principal case, leaned heavily on the doctrines set forth in that decision. In the *McCullom* case the classrooms were turned over to religious instructors during school hours. The Court held that such practice violated the First and Fourteenth Amendments of the Constitution, which prohibit the state from establishing religion or forbidding its free exercise. The opinion of the *McCullom* case contains the following:

> Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend religious classes. This is beyond all question a utilization of

[5] *Id.* at 688.
[6] 333 U. S. 203 (1948).

> the tax-established and tax-supported public school system to aid religious groups to spread their faiths. And it falls squarely under the ban of the First Amendment.[7]

Reference is made in this case to *Everson v. Board of Education*,[8] where it is stated again that "[n]either a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."

The principle applied by the Supreme Court of the United States in the *McCullom* case and by the New Mexico Court in the *Zellers* opinion seems well established. The difficulty arises in middle-road cases such as the recent *Zorach* case, where, in this writer's mind, the dissenting opinions were the more logical and more carefully thought out.

VALIDITY OF LOYALTY OATH

Oklahoma. A taxpayer sought to enjoin the Board of Regents of the Oklahoma Agricultural Colleges from paying the salaries of teachers who had not signed a loyalty oath required by statute. The Supreme Court of Oklahoma, affirming the decision of the district court, held: the oath required does not (1) violate the right of contract, (2) deprive public officials and employees of property or liberty without due process of law, or (3) interfere with religious freedom; nor is the statute requiring such an oath a bill of attainder or an *ex post facto* law.[9]

The oath in question contained, among other clauses, the following:

> I do solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic.

During the term of employment by the State, the signers of the oath agreed:

> I will not advocate and . . . will not become a member of any party or organization, political or otherwise, that advocates the

[7] *Id.* at 209, 210.
[8] 330 U. S. 1, 15 (1946).
[9] Board of Regents v. Updegraff, ... Okla. ....., 237 P. 2d 131 (1951).

> overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means.
>
> No compensation nor reimbursement for expenses incurred shall be paid to any political officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this Act.

(1) It is a widely accepted principle of law that a contract not contrary to public policy will be protected by the Constitution from hostile legislation; but the United States Supreme Court, as early as 1898, modified this doctrine by holding:

> Where . . . the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked.[10]

Even earlier, in 1877, the Supreme Court had affirmed the right of the government to employ its police power in order to protect the lives, health, and property of its citizens or to preserve good order and the public morals.[11] There seems little doubt, then, that a legislative body does have the power and right to interfere with or to limit the contracting rights of certain of its citizens when some right or safeguard of the people as a whole is possibly in jeopardy.[12]

(2) The teachers involved were not successful with their claim that their personal property or liberty was taken without due process of law. Their contention was that they, as citizens, had the right under the Constitution to engage in any employment they desired and that the requirement of the oath, by its very terms, restricted that right.

Judicial holdings have been numerous, however, which have

[10] Chicago, Burlington and Quincy R. Co. v. Nebraska, 170 U. S. 57 (1898).
[11] Beer Co. v. Massachusetts, 97 U. S. 25 (1877).
[12] Cantwell v. Connecticut, 310 U. S. 296 (1940).

established the principle that private freedom is always subject to restrictions if such restrictions are deemed necessary or desirable to protect the public safety and welfare.[13] In line with such concepts, a public institution is not compelled by some vague constitutional right to employ workers without imposing any terms or conditions.[14] The teachers, although employees of the State, had no constitutional right to be so employed. "It belongs to the State . . . to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities."[15]

(3) Some of the teachers who refused to sign the oath did so as conscientious objectors, contending that the oath invaded their right to religious freedom guaranteed by the Federal and State Constitutions. They based their contention upon that clause of the oath which read as follows: ". . . I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary." The Oklahoma Court pointed out that the concept of religious freedom had two aspects, freedom to believe and freedom to act. The first is absolute; the second is not, but is subject to governmental regulation for the protection of society.[16] Provision has always been made in time of war for conscientious objectors, but the court emphasized that the right to such provision is not guaranteed by any constitutional phrase or clause. Should such allowance be refused, there could be no question but that the objecting parties would be disobeying the

[13] The courts have sustained a complete regulatory control over professions directly concerned with the public health. Reetz v. Michigan, 188 U. S. 505 (1903); Dent v. West Virginia, 129 U. S. 114 (1889). Compulsory vaccination has been sustained. Jacobson v. Massachusetts, 197 U. S. 11 (1905). The Court has also sustained a city ordinance forbidding the burial of the dead within the city limits as being detrimental to the public health. Laurel Hill Cemetery v. City and County of San Francisco, 216 U. S. 358 (1910). In another field, the Court has sustained the validity of "blue-sky" laws, regulating the sale of securities. Hall v. Geiger-Jones Co., 242 U. S. 539 (1917).

[14] Heim v. McCall, 239 U. S. 175 (1915); Ellis v. U. S., 206 U. S. 246 (1907); McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N. E. 517 (1892); People v. Crane, 214 N. Y. 154, 108 N. E. 427 (1915).

[15] Atkin v. Kansas, 191 U. S. 207, 222 (1903).

[16] Cantwell v. Connecticut, cited *supra* note 12.

law if they refused to bear arms, regardless of their strong religious beliefs.[17]

The loyalty oath was also attacked as being both a bill of attainder and an *ex post facto* law, both of which contentions the court denied.

Regarding the bill of attainder, the Oklahoma court referred to a then new United States Supreme Court decision, *Garner v. Board of Public Works of Los Angeles*,[18] decided June 4, 1951. There Justice Clark, in delivering the opinion of the Court, followed the definition stated by an earlier Court and held that bills of attainder are "legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[19] Punishment is a prerequisite to a bill of attainder; and the Supreme Court concluded that punishment is not imposed "by a general regulation which merely provides standards of qualification and eligibility for employment.[20] The *Garner* case concerned the failure of employees of the City of Los Angeles to sign a loyalty oath much like the one in question in the principal case.

The Oklahoma court dismissed the issue of *ex post facto* law in much the same manner as the bill of attainder issue. The court stated that punishment is also a necessary factor in an *ex post facto* law and concluded that the action contemplated by the statute cannot be construed as punishment.[21]

There seems little room to doubt that the Oklahoma court was correct in its holdings and that the decision, if appealed, would

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[17] *In re* Summers, 325 U. S. 561 (1945), involved the refusal to admit a conscientious objector to the practice of law. The Court said: "It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship." *Id.* at 573. There were four dissents in this case.

[18] 341 U. S. 716.

[19] U. S. v. Lovett, 328 U. S. 303, 315 (1946).

[20] *Id.* at 722.

[21] *Ibid.*

be affirmed by the Federal Supreme Court. The danger and threat to the nation and to each person individually, arising from the growth and spread of Communistic teachings and practices, has for some time now been considered grave. Governmental units, both State and Federal, have the unquestioned right to oppose, by whatever means appropriate, the spread of any such doctrines and practices. Of this fact the United State Supreme Court has left no doubt.

Restrictive Racial Covenants and Money Damages

Oklahoma. In *Correll v. Earley*[22] Correll and another sought to enforce covenants which forbade the sale, lease, or gift of property in a certain block to any person of the Negro or African race. Defendants were alleged to have conspired and to have broken the agreement maliciously for the purpose of reducing the value of Correll's land. For such malicious acts and the alleged resulting harm, plaintiffs sought damages. The district court dismissed the case. The Oklahoma Supreme Court held that a cause of action for conspiracy was stated and awarded damages.

During the pendency of this case, the famous *Shelley v. Kraemer* decision was rendered,[23] which forbade the enforcement of restrictive covenants affecting racial groups on the ground that equal protection of the laws would thus be denied. The action sought and denied by the United States Supreme Court in the *Shelley* case was an injunction forcing the colored tenant to vacate the premises, *i.e.*, an equitable remedy. At the time, there was considerable legal speculation concerning the action the Court would have taken had the relief sought been money damages. It is a widely accepted principle of contract law that an action at law for damages resulting from a breach of contract will lie in many instances where equity will deny specific performance of the contract.[24] Consequently, the issue of the availability of damages in

[22] _____Okla._____, 237 P. 2d 1017 (1951).
[23] 334 U. S. 1 (1948).
[24] See 49 Am. Jur., *Specific Performance*, § 6.

case of breach of such a restrictive covenant in a contract was left very much open.

The first case to pass upon the constitutionality of an award for money damages was *Weiss v. Leaon.*[25] The Missouri court held that "enforcement," as used by the Supreme Court in the *Shelley* case, referred only to the equitable remedy of specific performance. This holding has met with disapproval in many quarters. It has been doubted that the *Weiss* opinion would be affirmed if appealed to the Supreme Court of the United States.[26] One writer has aptly phrased the argument: "It was not the particular way in which the state courts were enforcing the covenants, but the fact that they were enforcing them at all, that the Supreme Court found repugnant in the *Shelley* case."[27]

It has been felt that the term "enforcement" embraces both legal and equitable actions. Constitutionally, the difference between the two is one of degree rather than one of substance.[28] Specific performance and damages are merely different methods of enforcement.[29] The *Shelley* case has been discussed widely, and its implications have been painstakingly explored by legal writers. Most commentators have approved the decision, and many have concluded that the opinion forbids enforcement both by injunction or by way of damages.[30]

It is admitted that, under usual conditions, when a person agrees with another that he will perform or will not perform in a specified manner, he should expect to pay for the damage caused to the wronged party as a result of the breach of the agree-

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[25] .....Mo....., 225 S. W. 2d 127 (1949).

[26] See Note, 30 B. U. L. Rev. 273, 274 (1950).

[27] See Note, 18 Geo. Wash. L. Rev. 417, 418 (1949).

[28] See Note, 30 B. U. L. Rev. 273 (1950).

[29] *Ibid.*

[30] Lathrop, *The Racial Covenant Cases,* 1948 Wis. L. Rev. 508, 525, 527; Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases,* 16 U. Chi. L. Rev. 203, 217, 224 (1949); Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values,* 24 Notre Dame Law. 157, 182 (1948); Notes, 17 Univ. of Cin. L. Rev. 277 (1948), 48 Col. L. Rev. 1241, 1244 (1948), 46 Mich. L. Rev. 978, 979 (1948), 27 N. C. L. Rev. 224, 230, n. 22 (1948), 21 So. Calif. L. Rev. 358, 365 (1948).

ment. A promise to discriminate against a race of people, however, is felt to be "odious to a free people whose institutions are founded upon the doctrine of equality."[31] The performance of such a promise creates a greater evil than does the breach of a covenant.[32]

It should not be said, however, that the Oklahoma court erred in its holding in the principal case; for another element was present which was missing, apparently, in the *Weiss* situation. The original white owner in the *Correll* case, to avoid having to pay damages for breach of the covenant, entered into conspiracy to convey to one who was not financially responsible, which party then was to convey to the Negro purchaser. On this basis then, one of malice and conspiracy. the court held that the plaintiff did present a good cause of action.

Those who believe that the *Shelley* decision should be limited in application to the fact situation presented in that case would doubtless contend that the action forbidden by the Court there was the actual ejectment of the Negro occupant of the property. The plaintiff in the *Shelley* case sought actually to prevent the occupation of the land by Negroes; the present case does not seek this, directly at least, but rather demands payment from the grantor for the reduction of value of the land resulting from his conveyance to a member of the Negro race. It is submitted, however, that the *Shelley* case, at least in principle, was based upon discrimination, and that discrimination is present in any case such as this involving restrictive covenants. The moral principle, not the particular facts, would doubtless lead the Supreme Court to expand the reasoning of the *Shelley* case to include fact situations such as the present.

The writer believes that the *Correll* case does not conflict, though, with the prevailing view that restrictive covenants will be enforced neither by specific performance nor by actions for dam-

[31] Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

[32] See Recent Cases, 98 U. Pa. L. Rev. 588 (1950).