Supplementary Material

Chapter 10: The Reagan Era—Individual Rights/Establishment/Free Exercise

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Mozert v. Hawkins County Board of Education, 827 F. 2d 1058 (6th Cir. 1987)

Bob and Alice Mozert were evangelical Christians whose children attended public schools in Hawkins County, Tennessee. The Mozerts objected to a Board of Education requirement that their children read from a series of books published by Holt, Rinehart and Winston. The Mozerts and other conservative Christian parents believed their religious beliefs were violated by the discussions in those books of such matters as evolution, magic, women who had successful professional careers, and a one world society. The Mozerts sued the Hawkins County Board of Education. They claimed that the Board's "no exemption from the readings" policy violated free exercise rights protected by the First and Fourteenth Amendments. The district court awarded the families $51,531 in damages and issued an injunction against any effort to require students to read the contested books. The Board of Education appealed to the Court of Appeals for the Sixth Circuit.

The Court of Appeals unanimously reversed the lower court decision. The three separate opinions in Mozert *agreed that parents did not have a free exercise right to have their children exempted from public school readings they believed inconsistent with their religious faith. What different reasons did the judges give for reaching that conclusion? Which opinion, if any, do you believe best interprets the free exercise clause? Were the justices right to assume that public education could not function if Mozert and other families were given exemptions? Judge Boggs was a member of the Reagan administration before being appointed to the Supreme Court. Based on his opinion, what do you believe were his policy preferences in this case? Did he vote his policy preferences?*

LIVELY, CHIEF JUDGE.

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The first question to be decided is whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment. . . .

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. . . Proof that an objecting student was required to participate beyond reading and discussing assigned materials, or was disciplined for disputing assigned materials, might well implicate the Free Exercise Clause because the element of compulsion would then be present. But this was not the case either as pled or proved. The record leaves no doubt that the district court correctly viewed this case as one involving exposure to repugnant ideas and themes as presented by the Holt series.

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In *Sherbert v. Verner* (1963), . . . there was governmental compulsion to engage in conduct that violated the plaintiffs' religious convictions. That element is missing in the present case. The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.

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[I]t is abundantly clear that the exposure to materials in the Holt series did not compel the plaintiffs to "declare a belief," "communicate by word and sign [their] acceptance" of the ideas presented,

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or make an "affirmation of a belief and an attitude of mind." In [the flag salute cases], the unconstitutional burden consisted of compulsion either to do an act that violated the plaintiff's religious convictions or communicate an acceptance of a particular idea or affirm a belief. No similar compulsion exists in the present case.

The parents in [*Wisconsin v. Yoder* (1972)] were required to send their children to some school that prepared them for life in the outside world, or face official sanctions. The parents in the present case want their children to acquire all the skills required to live in modern society. They also want to have them excused from exposure to some ideas they find offensive. Tennessee offers two options to accommodate this latter desire. The plaintiff parents can either send their children to church schools or private schools, as many of them have done, or teach them at home. Tennessee law prohibits any state interference in the education process of church schools:

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Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.

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In short, distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion.

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The "tolerance of divergent . . . religious views" . . . is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must "live and let live." If the Hawkins County schools had required the plaintiff students either to believe or say they believe that "all religions are merely different roads to God," this would be a different case. No instrument of government can, consistent with the Free Exercise Clause, require such a belief or affirmation. However, there was absolutely no showing that the defendant school board sought to do this; indeed, the school board agreed at oral argument that it could not constitutionally do so. Instead, the record in this case discloses an effort by the school board to offer a reading curriculum designed to acquaint students with a multitude of ideas and concepts, though not in proportions the plaintiffs would like. While many of the passages deal with ethical issues, on the surface at least, they appear to us to contain no religious or anti-religious messages. Because the plaintiffs perceive every teaching that goes beyond the "three Rs" as inculcating religious ideas, they admit that any value-laden reading curriculum that did not affirm the truth of their beliefs would offend their religious convictions.

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CORNELIA G. KENNEDY, CIRCUIT JUDGE, concurring.

I agree with Chief Judge Lively's analysis and concur in his opinion. However, even if I were to conclude that requiring the use of the Holt series or another similar series constituted a burden on appellees' free exercise rights, I would find the burden justified by a compelling state interest.

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. . . Teaching students about complex and controversial social and moral issues is . . . essential for preparing public school students for citizenship and self-government. . .

The evidence at trial demonstrated that mandatory participation in reading classes using the Holt series or some similar readers is essential to accomplish this compelling interest and that this interest could not be achieved any other way. Several witnesses for appellants testified that in order to develop critical reading skills, and therefore achieve appellants' objectives, the students must read and discuss complex, morally and socially difficult issues. Many of these necessarily will be subjects on which appellees believe the Bible states the rule or correct position. Consequently, accommodating appellees' beliefs would unduly interfere with the fulfillment of the appellants' objectives. Additionally, mandatory participation in the reading program is the least restrictive means of achieving appellants' objectives.

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Appellees' objections would arise even if the School Board selected another basal reading textbook series since the students would be required to engage in critical reading and form their own opinions and judgments on many of the same issues.

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BOGGS, CIRCUIT JUDGE, concurring.

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. . . The school board recognizes no limitation on its power to require any curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause. Our opinion today confirms that right, and I would like to make plain my reasons for taking that position.

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I . . . disagree with the court's view that there can be no burden here because there is no requirement of conduct contrary to religious belief. That view both slights plaintiffs' honest beliefs that studying the full Holt series would be conduct contrary to their religion, and overlooks other Supreme Court Free Exercise cases which view "conduct" that may offend religious exercise at least as broadly as do plaintiffs.

On the question of exposure to, or use of, books as conduct, we may recall the Roman Catholic Church's, "Index Librorum Prohibitorum." This was a list of those books the reading of which was a mortal sin, at least until the second Vatican Council in 1962. I would hardly think it can be contended that a school requirement that a student engage in an act (the reading of the book) which would specifically be a mortal sin under the teaching of a major organized religion would be other than "conduct prohibited by religion," even by the court's fairly restrictive standard. Yet, in what constitutionally important way can the situation here be said to differ from that? Certainly, a religion's size or formality of hierarchy cannot determine the religiosity of beliefs. Similarly, and analogous to our case, church doctrine before 1962 also indicated that portions of the banned books could be used or read in a context to show their error, and that references to, or small portions of, the books did not fall under the same ban. Again, it seems inconceivable that we would determine that a Catholic child had forfeited the right to object to committing a mortal sin by reading Hobbes because he was willing, in another context, to read small portions or excerpts of the same material.

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. . . I disagree with the idea that such a teaching of "critical reading" would constitute a compelling state interest which entitles the school board to deny plaintiffs the accommodation they seek.

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[T]he test for a compelling interest is quite strict, and requires far more than this or other speculations on possible future evils. To be compelling, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." In the absence of any testimony as to actual problems from the accommodation that was provided, it is difficult to see how this standard could be met, if a constitutional burden were established.

Thus, I believe the plaintiffs' objection is to the Holt series as a whole, and that being forced to study the books is "conduct" contrary to their beliefs. In the absence of a narrower basis that can withstand scrutiny, we must address the hard issues presented by this case: (1) whether compelling this conduct forbidden by plaintiffs' beliefs places a burden on their free exercise of their religion, in the sense of earlier Supreme Court holdings; and (2) whether within the context of the public schools, teaching material which offends a person's religious beliefs, but does not violate the Establishment Clause, can be a burden on free exercise.

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[T]he Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims.

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. . . A constitutional challenge to the content of instruction (as opposed to participation in ritual such as magic chants, or prayers) is a challenge to the notion of a politically-controlled school system. Imposing on school boards the delicate task of satisfying the "compelling interest" test to justify failure to accommodate pupils is a significant step. It is a substantial imposition on the schools to require them to justify each instance of not dealing with students' individual, religiously compelled, objections (as opposed to permitting a local, rough and ready, adjustment), and I do not see that the Supreme Court has authorized us to make such a requirement.

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Our interpretation of these key phrases of our Bill of Rights in the school context is certainly complicated by the fact that the drafters of the Bill of Rights never contemplated a school system that would be the most pervasive benefit of citizenship for many, yet which would be very difficult to avoid. . . .

The average public expenditure for a pupil in Hawkins County is about 20% of the income of the average household there. Even the modest tuition in the religious schools which some plaintiffs attended here amounted to about a doubling of the state and local tax burden of the average resident. Had the Founders recognized the possibility of state intervention of this magnitude, they might have written differently. However, it is difficult for me to see that the words "free exercise of religion," at the adoption of the Bill of Rights, implied a freedom from state teaching, even of offensive material, when some alternative was legally permissible.

Therefore, I reluctantly conclude that under the Supreme Court's decisions as we have them, school boards may set curricula bounded only by the Establishment Clause, as the state contends. Thus, contrary to the analogy plaintiffs suggest, pupils may indeed be expelled if they will not read from the King James Bible, so long as it is only used as literature, and not taught as religious truth. Contrary to the position of amicus American Jewish Committee, Jewish students may not assert a burden on their religion if their reading materials overwhelmingly provide a negative view of Jews or factual or historical issues important to Jews, so long as such materials do not assert any propositions as religious truth, or do not otherwise violate the Establishment Clause.

The court's opinion well illustrates the distinction between the goals and values that states may try to impose and those they cannot, by distinguishing between teaching civil toleration of other religions, and teaching religious toleration of other religions. It is an accepted part of public schools to teach the former, and plaintiffs do not quarrel with that. Thus, the state may teach that all religions have the same civil and political rights, and must be dealt with civilly in civil society. The state itself concedes it may not do the latter. It may not teach as truth that the religions of others are just as correct as religions as plaintiffs' own.

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Schools are very important, and some public schools offend some people deeply. That is one major reason private schools of many denominations—fundamentalist, Lutheran, Jewish—are growing. But a response to that phenomenon is a political decision for the schools to make. I believe that such a significant change in school law and expansion in the religious liberties of pupils and parents should come only from Supreme Court itself, and not simply from our interpretation. It may well be that we would have a better society if children and parents were not put to the hard choice posed by this case. But our mandate is limited to carrying out the commands of the Constitution and the Supreme Court.

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