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THE TEXTBOOK CASE*

PATRICK S. DUFFY

Introduction

LEGAL ANALYSIS REQUIRES, above all, respect for original wording. Secondary sources of information by way of commentaries on a Supreme Court decision frequently express selective perception of what the Court said, meant, etc. An apparatus of footnotes and citations is no guarantee of objectivity. Scholars who in their own fields would be merciless toward colleagues who misquoted, misattributed, or created expressions to strengthen their argument can themselves be extremely tolerant toward the free interpretation of court opinions based on questionable sources.

This danger lurks especially in the area of church-state cases. Commentaries come to be identified with the organizations from which they emanate. Accordingly, we look for the POAU, ACLU, NCEA, or B'nai B'rith viewpoints. This diversity of interpretation characterizes a democracy, but in the dispassionate analysis of a Supreme Court opinion, neither criticism nor distortion has a part. An acceptable alternative would be the publication of the words of a decision intact, but since this is not practical outside legal textbook and technical publications, we must settle for accurate reproduction of the essentials of the case as

The Case

Board of Education of Central School

District No. 1, etc., et., Appellants

v

James E. Allen, Jr., as Commissioner
of Education of New York, et al.

June 10, 1968

On appeal from
the Court of
Appeals of
New York

* Reprinted with permission from the July 1969 issue of *The Jurist*. The citations have been left in their original form.

we find it. In editing the case which follows, only faithful resemblance was permitted as a substitute for quotation. Hopefully, the results will be of some value to diocesan officials charged with policy and decision-making in the field of education.

Now commonly known as the Textbook Case, this Supreme Court decision was the latest landmark of that Court directly affecting church-state relations in the field of education.

In the opinion, Mr. Justice White summarized the law of the State of New York on which the case was brought, citing the initial 1950 New York Education Law 703, the 1965 amendments to 703 and New York Education Law 701 (1967 Supp.). The latter statute required local public school authorities to lend textbooks free of charge "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school."¹ The question before the Court was whether this statute was a "law respecting the establishment of religion or prohibiting the free exercise thereof," in violation of the First and Fourteenth Amendments to the Constitution in authorizing the lending of textbooks to students attending parochial schools. A 6 to 3 decision was handed down in favor of the constitutionality of the statute.

The Court did not analyze the distinction between designating and approving textbooks. The pertinent New York law reads: "Textbooks loaned to children enrolled in grades seven to twelve of said

private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees, or other school authorities." The Court did not dwell on the distinction between the public school using textbooks designated for its use while the private school has the option of using a textbook already designated for use in public schools or choosing a given textbook and having it approved by public school authorities.

The trial court held the law unconstitutional under both the First and Fourteenth Amendments and entered judgment for appellants. 51 Misc. 2d 297, 273 N.Y.S.2d 239 (1969). The Appellate Division reversed, ordering the complaint dismissed on the ground that appellant school boards had no standing to attack the validity of a state statute. 27 A.D.2d 69, 276 N.Y.S.2d 234 (1966). On appeal, the New York Court of Appeals concluded by a 4-3 vote that appellants did have standing but by a different 4-3 vote held that 701 was not in violation of either the State or the Federal Constitution. 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967). The Court of Appeals said that the law's purpose was to benefit all school children, regardless of the type of school they attended, and that only textbooks approved by public school authorities could be loaned. It therefore considered 701 "completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends." Section 701, the Court of Appeals concluded, is not a law which "establishes a religion or constitutes the use of public funds to aid reli-

¹ New York Education Law 701 (1967 Supp.) 3.

gious schools.” 20 N.Y.2d, at 117, 228 N.E.2d, at 794, 281 N.Y.S.2d, at 805.

Everson v. Board of Education, 330 U.S. 1 (1947) was the first of its own opinions cited by the Supreme Court as “the case decided by this Court that is most nearly in point for today’s problem.” Therein the Court held that the Establishment Clause did not prevent “New Jersey from spending tax raised funds to pay the bus fares of parochial schools as part of a general program under which it pays the fares of pupils attending public and other schools.”

The Court repeats the major result of the *Everson* decision, namely, that “children are helped to get to church schools” and summarized the findings in *Everson* to the effect that, “as with public provision of police and fire protection, sewage facilities, and streets and sidewalks, payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment.”

Justice White singled out the *Schempp* rule as the basis for the Court’s decision, noting that its test was ascribed to by eight Justices, based on the following citation of *Everson* by the *Schempp* Court:

The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits

religion. *Everson v. Board of Education*, 374 U.S., at 222.

The Court considered the New York law in the instant case similar to the statute upheld in the *Everson* case, i.e., a law having “a secular legislative purpose and a primary effect that neither advances nor inhibits religion.” The purpose of 701 as the Court finds it stated by the New York Legislature is “the furtherance of the educational opportunities available to the young.” As to the second aspect of the test, the Court states that “Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose.” The parent-child benefit theory clearly follows: “Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.”

As in the *Everson* case the Court mentions the fact that “free books make it more likely that some children choose to attend a ‘sectarian school’ but goes on to add that this factor “does not alone demonstrate an unconstitutional degree of support for a religious institution.”

In treating the problem of loaning religious books the Court sees 701 as authorizing only secular books while noting that no evidence was presented on this aspect of the law. As a criterion it was assumed that books loaned to students in private school “are books that are not unsuitable for use in the public schools because of religious content.”

Answering the contention that all books are employed to teach religion, the opinion invokes *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), recognizing that “reli-

gious schools pursue two goals, religious instruction and secular instruction." Since that case it has been an accepted legal premise that "the States' interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters." Corroborating this holding the Court chose to mention the substantial body of case law supporting the right of the States to regulate compulsory attendance, hours of instruction, teacher certification and prescribed subjects in private schools. As a corollary to these cases the opinion cites *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), wherein a statute requiring that textbooks be provided both public and private schools was considered constitutional.

The Court goes on to endorse private education in these terms: "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence and experience." In a footnote cognizance is taken of the enrollment in nonpublic schools, 21.5 per cent in the State of New York with a comparable statistic of at least 10 per cent for the U.S. as a whole.

In conclusion the opinion of the Court again refutes appellants' contention that all teaching in a sectarian school is religious or that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of

religion. . . . Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history or literature are used by the parochial schools to teach religion."

Accordingly, the Court felt unable to hold that 701 as a statute resulted in unconstitutional involvement of the State or that it offended the Free Exercise Clause of the First Amendment by coercing appellants as individuals in the practice of their religion.

In a brief concurring opinion Mr. Justice Harlan underscored the necessity of government's maintaining a neutral attitude toward religion quoting in support the requirement that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and *non*-religion, and that it work deterrence of no religious belief." *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (concurring opinion of Goldberg, J.). He did not consider religion to be the standard for action or inaction in 701 of the Education Law of New York and felt constrained to hold that "the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State. . . ."

Mr. Justice Black, in a dissenting opinion, described the majority opinion as "a flat, flagrant, open violation of the First and Fourteenth Amendments. . . ." He bases his opinion on a statement in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), repeated in *McCollum v. Board of Education*, 333 U.S. 203, 210-211 (1948):

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 or influence a person to go or 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 practise religion. Neither a State nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Justice Black sees the First and Fourteenth Amendments in *Everson* and *McCullum* "as protecting the taxpayers of a State from being compelled to pay taxes to their government to support the agencies of private religious organizations the taxpayers oppose." He is unequivocal in regarding the decision in the instant case as the authorization of the State to tax for church purposes, linking church and state together despite the fact that "it was to escape laws precisely like this that a large part of the Nation's immigrants fled to this country. It was also to escape laws and such consequences that the First Amendment was written in language strong and clear barring passage of any law 'respecting establishment of religion'."

Justice Black characterized advocates of

701 as propagandists given to insidious approaches with the purpose of "complete domination and supremacy of their particular brand of religion."

He reminds the Court that he wrote the opinion in the *Everson* Case authorizing bus transportation for children in private schools but he hastens to distinguish between bus transportation, lunches, police and fire protection on the one hand and providing free textbooks on the other. While parenthetically accepting said textbooks as secular, they "realistically will in some way inevitably tend to propagate the religious views of the favored sect." He sees bus fares as a general non-discriminatory service by contrast with books "which are the heart of any school."

Justice Black foresees the possibility of the argument to support free textbooks for private schools being extended to the use of state or federal government funds for property, buildings, and salaries of teachers to a point where voluntary contributions from members of a sect would be unnecessary. He cites the Higher Education Facilities Act, 20 U.S.C. 701 *et seq.*, as evidence of government financing of building for sectarian religious schools. He regards all such employment of tax-raised funds as unconstitutional "even to the extent of one penny" and concludes that "the Court's affirmation here bodes nothing but evil to religious peace in this country."

In the second and longest of three dissenting opinions Mr. Justice Douglas sees the statute on its face empowering each parochial school to make an initial crucial determination as to which textbooks it will

request for its students.² Justice Douglas is then concerned with the breadth of local school board discretion in "determining first whether the text³ has been or should be 'approved' for use in public schools and second whether the text is 'secular,' 'non-religious,' or 'non-sectarian'." As he sees it, the parochial school "will ask for the book or books that best promote its sectarian control. . . . If the school board resists . . . the contest will be on to keep the school board independent or to put it under church domination and control."

He distinguishes between textbook aid and other forms in the following words: "There is nothing ideological about a bus . . . a school lunch, nor a public nurse, nor a scholarship. The constitutionality of such public aid to students in parochial schools turns on considerations not present in the textbook case. The textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith. How can we possibly approve such state aid to religion? A parochial school textbook may contain many, many more seeds of creed and dogma than a prayer. Yet we struck down in *Engel v. Vitale*, 370 U.S. 421, an official New York prayer for its public schools, even though it was not plainly denominational."

Citing Judge Van Voorhis, joined by Chief Judge Fuld and Judge Breitel, dissenting below, Mr. Justice Douglas reiter-

² Attached to this opinion as Appendix A is the Textbook Requisition Form to be completed by an official of the private school.

³ I.e., the text requested by a private school.

ates their opinion that the difficulty "is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other." 20 N.Y.2d, at 122; 281 N.Y.S.2d, at 809; 228 N.E.2d, at 798. He wonders, for instance, if John M. Scott's *Adventures in Science* (1963) would be supplied by the State. In a quotation on embryology from the text the following is an excerpt:

. . . for the embryo has a human soul infused into the body by God. Human parents are partners with God in creation. They have very great powers and great responsibilities, for through their cooperation with God souls are born for heaven. (Pp. 618-19)⁴

To illustrate that comparative economics may not be, as it would seem, a non-sectarian subject, a quotation is provided from *Man in Time* (1964) by Arthur J. Hughes, a quotation from which the following excerpts would be presumably the most pertinent:

. . . man's right to private property stems from the Natural Law implanted in him by God. . . . (P. 560)

. . . many socialists, however, denied free will and said that man was a creation of his environment. . . . If socialists do not

⁴ A footnote reads: "Although the author of this textbook is a priest, the text contains no imprimatur and no nihil obstat. Although published by a Catholic Press, the Loyola University Press, Chicago, it is not marked in any manner as a 'denominational edition,' but is simply the general edition of the book. Accordingly, under Opinion of Counsel No. 181, the only document approaching a 'regular' on the issue involved here, *Adventures in Science* would qualify as 'non-sectarian.'"

deny Christ's message they often ignore it. Christ showed us by His life that this earth is a testing ground to prepare man for eternal happiness. . . . (Pp. 561-64)⁵

The remaining examples of subject areas susceptible to "blatant, creeping sectarianism" or "shadings" supplied by Mr. Justice Douglas are principally from the field of history: the Reformation, Inquisition, New England Establishment, Crusades, Spaniards in the New World, and Franco's revolution in Spain. His difficulty lies in determining, in the words of Mr. Justice Jackson, "where the secular ends and the sectarian begins in education." *McCollum v. Board of Education*, 333 U.S., at 237-238. He foresees the battle of the textbook in these words: "The battle will be on for those positions of control. Judge Van Voorhis expressed the fear that in the end the State might dominate the church. Others fear that one sectarian group, gaining control of the State agencies which approve the 'secular' textbooks will use their control to disseminate ideas most congenial to their faith."

On the aims and objectives of Catholic education this dissent alludes to the debate on Fordham's Catholicity⁶ and quotes Reverend Peter O'Reilly in reference to St.

John's University in Brooklyn.⁷ The latter quotation includes a letter sent by the Vice-President of St. John's "to all the faculty, both Catholics and non-Catholics, even those teaching law, science, and mathematics," wherein the following questions were addressed to faculty members:

1. What do you do to make your particular courses theocentric?
2. Do you believe there is anything the Administration or your colleagues can do to assist you in presenting your particular courses more 'according to the philosophical and theological traditions of the Roman Catholic Church'?

Similar solicitude for religious tradition on the part of educational institutions other than Catholic is evidenced by a quotation asserting the Presbyterian purposes of Lewis and Clark College in Oregon.

In the remainder of his opinion Mr. Justice Douglas concludes with a warning on the breadth of the powers of censorship which "can cut a wide swathe in many areas of education that involve an ideological element."⁸ The reference is to N.Y. Educ. L. 704 which vests in the Board of Regents together with the Commissioner of Education powers of censorship over seditious content in textbooks. He then recapitulates with reminders, warnings that approval for textbooks comes directly or indirectly from elected public officials with parochial schools taking the initiative in requisitioning "the books desired." From these facts he

⁵ A further footnote adds, "*Man in Time* contains a nihil obstat and an imprimatur. Thus if Opinion of Counsel No. 181 is applicable, this book may not be provided by the State. The Opinion of Counsel, however, is only 'advisory,' we are told; moreover, the religious endorsements could easily be removed by the author and publisher at the next printing."

⁶ Fleming, "Fordham Is Trying to Be Catholic with a Small 'c,'" *N. Y. Times Magazine*, December 10, 1967, p. 32.

⁷ *St. John's Chronicle of Folly*, 4 Continuum, 223, 233-234 (1966).

⁸ Cf. *Adler v. Board of Education*, 342 U.S. 485; *Barsky v. Board of Regents*, 347 U.S. 442.

sees an inevitable contest "for the 'proper' books will radiate the 'correct' religious view not only in the parochial school but in the public school as well." To support this contention there is cited a letter of the late Cardinal Spellman which was read "at all masses on Sunday, November 5, 1967, just before the vote on a proposed Constitution that would have opened wide the door to State aid to parochial schools."⁹

With a final conclusion that the majority holding violates the Establishment Clause of the First Amendment, the dissent concludes with a quotation from Madison's Memorial and Remonstrance against Religious Assessments:¹⁰

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same case any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment,¹¹ may force him to conform to any other establishment in all cases whatsoever?

In the third of the dissenting opinions, Mr. Justice Fortas is primarily concerned with the fact that the textbooks "are selected and prescribed by the sectarian schools themselves." Because of this factor

he sees "a specific program to use state funds to buy books prescribed by sectarian schools. . . ." He will only accept the term 'general' as applied by the majority opinion to the textbook program "if the school books made available to all children were precisely the same—the books selected for and used in the public school." The use of public money to provide *special* books for children in parochial schools amounts to aid for those sectarian establishments. Accordingly, the majority opinion becomes redundant when it holds that "books loaned to students are books that are not unsuitable for use in the public schools because of religious content." Because the statute "does not call for extending to children attending sectarian schools the same service or facility extended to children in public schools, Mr. Justice Fortas does not see the case as falling within the Everson principle and regards it as totally inaccurate for the majority opinion to compare textbooks with "public provision of police and fire protection, sewage facilities, and streets and sidewalks. They are furnished to all alike. They are not selected on the basis of specification by a religious sect. And patrons of any one sect do not receive services or facilities different from those accorded members of other religions or agnostics or even atheists."

Conclusions

The immediate outcome of the textbook holding is a determination that it is now constitutional to use public funds to provide textbooks for pupils in private and parochial schools. If the legislative drafting of New York's 701 had merely permitted parochial schools to select books already approved for

⁹ The letter is attached to this opinion as Appendix B.

¹⁰ Writings of James Madison (Hunt, ed., 1901), P. 186.

¹¹ A final reference S. Rep. No. 473, 90th Cong., 1st Sess., Pp. 9-10 (1967) provides "a recent account of the extent to which public funds are being poured into sectarian schools."

public schools, it seems reasonable to conclude that this opinion would have been a 7-2 rather than a 6-3 decision, with Mr. Justice Fortas concurring as a result. This fact is surely significant to those who contribute to the drafting of similar laws in the various states.

The decision paves the way for extended federal and state aid to parochial schools. Arguments favoring aid for secular textbooks are amenable to extended application in the educational world. In the field of educational technology a textbook has become a dated concept as a repository of knowledge, retaining little of its old form beyond that of a workbook that may or may not accompany televised or programmed instruction.

A teacher who uses a secular textbook to teach a secular subject may also be defined as a secular teacher and must certainly be viewed as contributing far more to the educational purposes of the state than a secular textbook. With government funds the parochial school could offer secular teachers competitive salaries while the parish would finance the teaching of religion. If seven lay secular teachers and a teacher of religion will constitute the future model of a Catholic school then the Church's attention and resources would now be better employed in religious education rather than in education. It is bewildering to find Religious Education faculties without a professional educator in their midst while flying the education flag.

What could be more neutral than a desk, a floor, a ceiling, and four walls together with all the educational appurtenances needed for a purely educational process? A

classroom or more could be provided by the Church in a school wherein religion and religiously oriented subjects could be taught. For that matter, every last vestige of religion may be removed from a given Catholic school with the pupils going across the playground to the Religious Education Center for classes in religion and related subjects. This is proposing shared time and facilities within a given parish.

Debate within the Church on this course of education should be resolved before further Supreme Court decisions are handed down on these issues. On one side of the debate are the proponents of Catholic schools with a small "c" to whom Mr. Justice Douglas refers. We have heard them assert that "multiplying three Madonnas by two rosaries" is both poor mathematics and poor religion. They have underscored repeatedly the exaggerated Catholic content of our history textbooks. Federal and state funds would assist in eliminating Catholic overcrowded classrooms and the unqualified Catholic teachers. Educational equipment and fringe benefits would abound so that we would be educationally equal to the public schools in all things. Would there be a difference? If not, it seems futile to argue for federal subsidization of a private reproduction of the public school system. This course would justify the accusation of divisiveness so frequently hurled this way. These were the problems raised by Archbishop Ireland¹² that still remain unresolved

¹² John Ireland, "State Schools and Parish Schools," *The Church in Modern Society* (2d ed.: Chicago: D. H. McBride and Co., 1897), pp. 199-214.

but more critical than ever in the current crisis confronting Catholic education.

If the teaching of religion remains a part of a federally subsidized Catholic school system, then what part will it constitute? At the other end of the scale are the Judaeo-Christian ethic defenders who see religion as an integral part of all subject matter. They even perceive metaphysical dangers to Catholic philosophy in the new math. Logically they should have filed a brief opposing the textbook decision. The author has taught on a state university campus and still wonders how you render research methodology or statistics theocentric. If Catholic philosophers of education have a contribution to make, it is surely in this context. Their definite guidelines should be practical and immediately forthcoming while there may still be time to redefine a viable Catholic education that could survive in our economy and within the interpretations of our Constitution.

When will the effects of the textbook decision be felt at the diocesan level? The effect of Supreme Court precedents on which it is based are still not felt in many dioceses. Twenty-one years after the *Everson* decision one still reads:

When voters in Anne Arundel County, Maryland, went to the polls on November 5, 1968, they were asked to approve a proposal that would have required the County to transport parochial and private school pupils anywhere in the County or within one mile of the County limits. The proposal was defeated by a ratio of four to three.

This has been the second time in four years that Anne Arundel County voters rejected the bus proposal. In 1960 a similar bill was

defeated by 6,000 votes; the 1968 proposal lost by a margin of about 7,000.¹³

If these decisions are to have an impact at the local state level, each diocese should embark on an educational program that would enlighten Catholics as to their constitutional rights. This merely entails instituting brief study sessions at the parochial level designed to examine the import of landmark church-state Supreme Court holdings. It is one of the prime objectives of Citizens for Educational Freedom to promote precisely this enlightened understanding of the rights of Catholic parochial school parents and pupils. The United States Catholic Conference (USCC) would surely make its resources available for organizational advice and the compilation of suitable study group materials in the area of Church-State. It is now obvious that an episcopal pastoral letter similar to that cited by Mr. Justice Douglas is no longer sufficient to enlighten and sway the electorate on the eve of a referendum.

The textbook decision has been dismissed with a "too little, too late" comment by those who accept or welcome the demise of Catholic schools. Despite the daily announcements of school closings, others derive new hope from this decision and Pennsylvania's quantum leap into state aid for private and parochial schools. However, the true significance of church-state decisions or future test cases should not be measured solely in terms of the present

¹³ "Reject Parochial Aid Again," *Phi Delta Kappan*, L (March, 1969), 428.

structure of Catholic education in the United States. Ten years hence the Church's educational enterprise may be conducted by the diocesan office of charities, concentrating on the education of the handicapped in the widest definition of that term. What if the Church concentrated its resources on the training of teachers and, as in Scotland, supplied the teaching of religion, merely reserving the right to approve teachers in Catholic schools, schools that would in all other respects be the responsibility of the state? These are but two samples within a range of possibilities.

Even the options cannot become a basis for future planning unless they are grounded in present and future constitutional rights granted to the Church. The long-range view of the Church's potential in education adds perspective to church-state decisions in education and even the closing of Catholic schools, ironical though it may seem, should create a new urgent necessity to educate Catholics to their potential rights under the Constitution in the whole field of education. This broader course, rather than the pastoral letter, is the avenue to the electorate and the elected.