MOZERT v. HAWKINS COUNTY BOARD OF EDUCATION
827 F.2d 1058 (6th Cir. 1987)

LIVELY, Chief Judge.

This case arose under the Free Exercise Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment. The district court held that a public school requirement that all students in grades one through eight use a prescribed set of reading textbooks violated the constitutional rights of objecting parents and students. The district court entered an injunction which required the schools to excuse objecting students from participating in reading classes where the textbooks are used and awarded the plaintiff parents more than $50,000 damages.

I.

A.

Early in 1983 the Hawkins County, Tennessee Board of Education adopted the Holt, Rinehart and Winston basic reading series (the Holt series) for use in grades 1-8 of the public schools of the county. In grades 1-4, reading is not taught as a separate subject at a designated time in the school day. Instead, the teachers in these grades use the reading texts throughout the day in conjunction with other subjects. In grades 5-8, reading is taught as a separate subject at a designated time in each class. However, the schools maintain an integrated curriculum which requires that ideas appearing in the reading programs reoccur in other courses. By statute public schools in Tennessee are required to include "character education" in their curricula. The purpose of this requirement is "to help each student develop positive values and to improve student conduct as students learn to act in harmony with their positive values and learn to become good citizens in their school, community, and society." Tennessee Code Annotated (TCA) 49-6-1007 (1986 Supp.).

Like many school systems, Hawkins County schools teach "critical reading" as opposed to reading exercises that teach only word and sound recognition. "Critical reading" requires the development of higher order cognitive skills that enable students to evaluate the material they read, to contrast the ideas presented, and to understand complex characters that appear in reading material. Plaintiffs do not dispute that critical reading is an essential skill which their children must develop in order to succeed in other subjects and to function as effective participants in modern society. Nor do the defendants dispute the fact that any reading book will do more than teach a child how to read, since reading is instrumental in a child's total development as an educated person.

The plaintiff Vicki Frost is the mother of four children, three of whom were students in Hawkins County public schools in 1983. At the beginning of the 1983-84 school year Mrs. Frost read a story in a daughter's sixth grade reader that involved mental telepathy. Mrs. Frost, who describes herself as a "born again

Christian," has a religious objection to any teaching about mental telepathy. Reading further, she found additional themes in the reader to which she had religious objections. After discussing her objections with other parents, Mrs. Frost talked with the principal of Church Hill Middle School and obtained an agreement for an alternative reading program for students whose parents objected to the assigned Holt reader. The students who elected the alternative program left their classrooms during the reading sessions and worked on assignments from an older textbook series in available office or library areas. Other students in two elementary schools were excused from reading the Holt books.

B.

In November 1983 the Hawkins County School Board voted unanimously to eliminate all alternative reading programs and require every student in the public schools to attend classes using the Holt series. Thereafter the plaintiff students refused to read the Holt series or attend reading classes where the series was being used. The children of several of the plaintiffs were suspended for brief periods for this refusal. Most of the plaintiff students were ultimately taught at home, or attended religious schools, or transferred to public schools outside Hawkins County. One student returned to school because his family was unable to afford alternate schooling. Even after the board's order, two students were allowed some accommodation, in that the teacher either excused them from reading the Holt stories, or specifically noted on worksheets that the student was not required to believe the stories.

On December 2, 1983, the plaintiffs, consisting of seven families--14 parents and 17 children--filed this action pursuant to 42 U.S.C. s 1983. In their complaint the plaintiffs asserted that they have sincere religious beliefs which are contrary to the values taught or inculcated by the reading textbooks and that it is a violation of the religious beliefs and convictions of the plaintiff students to be required to read the books and a violation of the religious beliefs of the plaintiff parents to permit their children to read the books. The plaintiffs sought to hold the defendants liable because "forcing the student-plaintiffs to read school books which teach or inculcate values in violation of their religious beliefs and convictions is a clear violation of their rights to the free exercise of religion protected by the First and Fourteenth Amendments to the United States Constitution."

C.

[In round one of the litigation, the Sixth Circuit ultimately ordered the district court below to hold full hearings.]

II.

A.

…. Counsel for the defendants stipulated that the plaintiffs' religious beliefs are sincere and that certain passages in the reading texts offend those

beliefs. However, counsel steadfastly refused to stipulate that the fact that the plaintiffs found the passages offensive made the reading requirement a burden on the plaintiffs' constitutional right to the free exercise of their religion. Similarly, counsel for the plaintiffs stipulated that there was a compelling state interest for the defendants to provide a public education to the children of Hawkins County. However, counsel stipulated only to a narrow definition of the compelling state interest--one that did not involve the exclusive use of a uniform series of textbooks. These stipulations left for trial the issues of whether the plaintiffs could show a burden on their free exercise right, in a constitutional sense, and whether the defendants could show a compelling interest in requiring all students in grades 1-8 of the Hawkins County public schools to use the Holt, Rinehart and Winston basal reading textbooks. These were questions of law to be determined on the basis of evidence produced at trial....

B.

Vicki Frost was the first witness for the plaintiffs and she presented the most complete explanation of the plaintiffs' position. The plaintiffs do not belong to a single church or denomination, but all consider themselves born again Christians. Mrs. Frost testified that the word of God as found in the Christian Bible "is the totality of my beliefs." There was evidence that other members of their churches, and even their pastors, do not agree with their position in this case.

Mrs. Frost testified that she had spent more than 200 hours reviewing the Holt series and had found numerous passages that offended her religious beliefs. She stated that the offending materials fell into seventeen categories which she listed. These ranged from such familiar concerns of fundamentalist Christians as evolution and "secular humanism" to less familiar themes such as "futuristic supernaturalism," pacifism, magic and false views of death....

Another witness for the plaintiffs was Bob Mozert, [who presented similar testimony]. .... Both witnesses testified under cross-examination that the plaintiff parents objected to passages that expose their children to other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct ones.

C

The district court held that the plaintiffs' free exercise rights have been burdened because their "religious beliefs compel them to refrain from exposure to the Holt series," and the defendant school board "has effectively required that the student plaintiffs either read the offensive texts or give up their free public education." In reaching this conclusion the district court analogized the plaintiffs' position to [the successful plaintiffs in the unemployment cases, supra].

The district court went on to find that the state had a compelling interest "in the education of its young," but that it had erred in choosing "to further its

legitimate and overriding interest in public education by mandating the use of a single basic reading series," in the face of the plaintiffs' religious objections. The court concluded that the proof at trial demonstrated that the defendants could accommodate the plaintiffs without material and substantial disruption to the educational process by permitting the objecting students to "opt out of the school district's reading program" and meet the reading requirements by home schooling. Tennessee's school attendance statute requires parents to cause their children between the ages of 7 and 16 to attend either a public or non-public school. "Non-public school" is defined to mean "a church-related school, a private school or a home school." TCA 49-6-3001. Although the statute appears to contemplate that a student will attend one or the other of the three approved types of school, the district court apparently believed that a partial opt-out would be consistent with the statutory scheme.

The court entered an injunction prohibiting the defendants "from requiring the student-plaintiffs to read from the Holt series," and ordering the defendants to excuse the student plaintiffs from their classrooms "[d]uring the normal reading period" and to provide them with suitable space in the library or elsewhere for a study hall. 647 F.Supp. at 1203. ....

III

A

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....

B

In this case the district court erroneously applied decisions based on governmental requirements that objecting parties make some affirmation or take some action that offends their religious beliefs. In Sherbert the burden on the plaintiff's right of free exercise consisted of a governmental requirement that she either work on her Sabbath Day or forfeit her right to benefits. Similarly, in Thomas the plaintiff was denied a benefit for refusing to engage in the production of armaments. In each case the burden on the plaintiff's free exercise of religion consisted of being required to perform an act which violated the plaintiffs' religious convictions or forego benefits. Ms. Sherbert was not merely exposed to the view that others in the work force had no religious scruples against working on Saturdays and Mr. Thomas was not merely exposed to government publications designed to encourage employees to produce armaments. In each case there was compulsion to do an act 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.

C.

[Plaintiffs presented Barnette as supporting their position, to which the court replied that] in Barnette 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....

D

[The court went on to consider Wisconsin v. Yoder, 406 U.S. 205 (1972).] Yoder rested on such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden. The plaintiff parents in Yoder were Old Order Amish and members of the Conservative Amish Mennonite Church, who objected to their children being required to attend either public or private schools beyond the eighth grade. Wisconsin school attendance law required them to cause their children to attend school until they reached the age of 16. Unlike the plaintiffs in the present case, the parents in Yoder did not want their children to attend any high school or be exposed to any part of a high school curriculum. The Old Order Amish and the Conservative Amish Mennonites separate themselves from the world and avoid assimilation into society, and attempt to shield their children from all worldly influences. The Supreme Court found from the record that--

> [C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat to undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

As if to emphasize the narrowness of its holding because of the unique 300 year history of the Old Amish Order, the Court wrote:

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

This statement points up dramatically the difference between Yoder and the present case. The parents in Yoder 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:

> The state board of education and local boards of education are prohibited from regulating the selection of faculty or textbooks or the establishment of a curriculum in church-related schools. TCA 49-50-801(b).

Similarly the statute permitting home schooling by parents or other teachers prescribes nothing with respect to curriculum or the content of class work.

Yoder was decided in large part on the impossibility of reconciling the goals of public education with the religious requirement of the Amish that their children be prepared for life in a separated community.... No such threat exists in the present case, and Tennessee's school attendance laws offer several options to those parents who want their children to have the benefit of an education which prepares for life in the modern world without being exposed to ideas which offend their religious beliefs....

IV

A

The Supreme Court has recently affirmed that public schools serve the purpose of teaching fundamental values "essential to a democratic society." These values "include tolerance of divergent political and religious views" while taking into account "consideration of the sensibilities of others." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). The Court has noted with apparent approval the view of some educators who see public schools as an "assimilative force" that brings together "diverse and conflicting elements" in our society "on a broad but common ground." The critical reading approach furthers these goals. Mrs. Frost stated specifically that she objected to stories that develop "a religious tolerance that all religions are merely different roads to God." Stating that the plaintiffs reject this concept, presented as a recipe for an ideal world citizen, Mrs. Frost said, "We cannot be tolerant in that we accept other religious views on an equal basis with ours." While probably not an uncommon view of true believers in any religion, this statement graphically illustrates what is lacking in the plaintiffs' case.

The "tolerance of divergent ... religious views" referred to by the Supreme Court 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.

Although it is not clear that the plaintiffs object to all critical reading, Mrs. Frost did testify that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer. There is no evidence that any child in the Hawkins County schools was required to make such judgments. It was a goal of the school system to encourage this exercise, but nowhere was it shown that it was required. When asked to comment on a reading assignment, a student would be free to give the Biblical interpretation of the material or to interpret it from a different value base. The only conduct compelled by the defendants was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials. This is the exposure to which the plaintiffs objected. What is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion….

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.

Appellants have stated that a principal educational objective is to teach the students how to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these subjects. Several witnesses testified that the only way to achieve these objectives is to have the children read a basal reader, participate in class discussions, and formulate and express their own ideas and opinions about the materials presented in a basal reader. Thus, appellee students are required to read stories in the Holt series, make personal judgments about the validity of the stories, and to discuss why certain characters in the stories did what they did, or their values and whether those values were proper….

In Bethel School District No. 403 v. Fraser, the Supreme Court stated: "The role and purpose of the American public school system was well described by two historians, saying 'public education must prepare pupils for citizenship in the Republic.'" Additionally, the Bethel School Court stated that the state through its public schools must "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility.

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….

The state and the Hawkins County School Board also have a compelling interest in avoiding disruption in the classroom. Hawkins County Schools utilize an integrated curriculum, designed to prepare students for life in a complex, pluralistic society, that reinforces skills and values taught in one subject in other areas. The Director of Elementary Education testified that teachers use every opportunity within the school day to reinforce information taught in the different subject areas. For example, the students may discuss stories in the Holt readers dealing with evolution or conservation of natural resources in the science course. This approach to learning is well-recognized and enables the students to see learning "as part of their total life, not just [as] bits and pieces." This is particularly true in grades one through four where reading is taught throughout the school day, rather than in a particular period. Appellants would be unable to utilize effectively the critical reading teaching method and accommodate appellees' religious beliefs. If the opt-out remedy were implemented, teachers in all grades would have to either avoid the students discussing objectionable material contained in the Holt readers in non-reading classes or dismiss appellee students from class whenever such material is discussed. To do this the teachers would have to determine what is objectionable to appellees. This would either require that appellees review all teaching materials or that all teachers review appellees' extensive testimony. If the teachers concluded certain material fell in the objectionable classification but nonetheless considered it appropriate to have the students discuss this material, they would have to dismiss appellee students from these classes. The dismissal of appellee students from the classes would result in substantial disruption to the public schools.

Additionally, Hawkins County Public Schools have a compelling interest in avoiding religious divisiveness…. The opt-out remedy would permit appellee students to be released from a core subject every day because of their religion. Thus, although some students in the Hawkins County schools are presently

released from class during the school day for special instruction, these students are not released because they have a religious objection to material being presented to the class.... Accordingly, the opt-out remedy ordered by the court is inconsistent with the public schools' compelling interest in "promoting cohesion among a heterogenous democratic people." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

The divisiveness and disruption caused by the opt-out remedy would be magnified if the schools had to grant other exemptions. Although the District Court found that no other objections to the Hawkins County public school curriculum have been raised and that Hawkins County is homogeneous from a religious perspective, this case would create a precedent for persons from other religions to request exemptions from core subjects because of religious objections.<fnc>a If the school district were required to accommodate exceptions and permit other students to opt-out of the reading program and other core courses with materials others found objectionable, this would result in a public school system impossible to administer….

Accordingly, I also would reverse the judgment of the District Court for these additional reasons, as well as the reasons so well stated by Chief Judge Lively.

BOGGS, Circuit Judge, concurring.

I concur with my colleagues that Hawkins County is not required by the Constitution to allow plaintiffs the latitude they seek in the educational program of these children…. [However, Judge Boggs rejects the majority's analysis.]

If the situation of these children is not a burden on their religious exercise, it must be because of a principle applicable to all religious objectors to public school curricula. Thus, I believe a deeper issue is present here, is implicitly decided in the court's opinion, and should be addressed openly. 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.

I

…. I approach this case with a profound sense of sadness. At the classroom level, the pupils and teachers in these schools had in most cases reached a working accommodation. Only by the decisions of higher levels of political authority, and by more conceptualized presentations of the plaintiffs' positions, have we reached the point where we must decide these harsh questions today. The school board faced what must have seemed a prickly and difficult group of parents, however dedicated to their children's welfare. In a similar situation, the poet Edwin Markham described a solution:

> He drew a circle that shut me out--
> Heretic, Rebel, a thing to flout.
> But Love and I had the wit to win: We drew a circle that took him in!
> [E. Markham, "Outwitted," in Best Loved Poems of the American People, p. 67 (Garden City, 1957)]

As this case now reaches us, the school board rejects any effort to reach out and take in these children and their concerns. At oral argument, the board specifically argued that it was better for both plaintiffs' children and other children that they not be in the public schools, despite the children's obvious desire to obtain some of the benefits of public schooling. Though the board recognized that their allegedly compelling interests in shaping the education of Tennessee children could not be served at all if they drove the children from the school, the board felt it better not to be associated with any hybrid program.

Plaintiffs' requests were unusual, but a variety of accommodations in fact were made, with no evidence whatsoever of bad effects. Given the masses of speculative testimony as to the hypothetical future evils of accommodating plaintiffs in any way, had there been any evidence of bad effects from what actually occurred, the board would surely have presented it. As we ultimately decide here, on the present state of constitutional law, the school board is indeed entitled to say, "my way or the highway." But in my view the school board's decision here is certainly not required by the Establishment Clause.

II

....

III

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….

While this argument would seem persuasive that studying objectionable material would be "conduct" contrary to religious belief, the court's opinion attempts to distinguish our case from Thomas v. Review Board, by emphasizing that the plaintiff there was asked to "engage in a practice" forbidden by his religion, and the plaintiffs here are not. I do not believe that distinction bears up under scrutiny. Thomas had to hook up chains to a conveyor in a factory. For Thomas, there was no commandment against hooking up chains. He asserted that this would be "aiding in the manufacture of items used in the advancement of war," because it was in a tank turret line, but he had also said that he would work in a steel factory that might ultimately sell to the military. (A fellow Witness was willing to work in the turret line.) This distinction appears as convoluted as plaintiffs' distinctions seem to some. Nevertheless, Thomas drew his line, and the Supreme Court respected it and dealt with it....

Here, plaintiffs have drawn their line as to what required school activities, what courses of study, do and do not offend their beliefs to the point of prohibition. I would hold that if they are forced over that line, they are "engaging in conduct" forbidden by their religion. The court's excellent summary of its holding on this point appears to concede that what plaintiffs were doing in school was conduct, but that there "was no evidence that the conduct required of the students was forbidden by their religion." I cannot agree. The plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious beliefs, including extensive Scriptural references. The district court found that "plaintiffs' religious beliefs compel them to refrain from exposure to the Holt series." I would think it could hardly be clearer that they believe their religion commands, not merely suggests, their course of action....

IV

I have given considerable thought to Judge Kennedy's opinion discussing the importance of the state's interest in "critical reading" .... 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.... The simple answer to such a claim would seem to be the type of testing which is mandated for all non-public school students in Tennessee. Plaintiffs are quite confident of their ability to pass any consistent tests propounded by the state. Perhaps because of these facts, the state seems unwilling to rest its claims of educational damage on any such tests, and expounds a particularly slippery standard for "critical reading." In particular, when Farr is asked (on direct examination, by the school board's own attorney) if plaintiffs' children, who are getting good grades, must be learning what the state wants them to, he replies,

"It's very difficult to measure evaluative and critical reading.... It would be very difficult to know that if that youngster is making adequate progress."

It seems to me to be extremely difficult, not to say unfair, to rest a compelling state interest on the asserted failure of plaintiffs to learn something which defendants are apparently unable to define and unwilling to test for....

In any event, the 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." Sherbert v. Verner, quoting Thomas v. Collins, 323 U.S. 516, 530. 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.

V

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.

…. The plaintiffs here have no problem fitting within any of the Court's various definitions of religion, as no one contends that their basic beliefs are not religious.

However, determining that plaintiffs' beliefs are religious does not automatically mean that all practices or observances springing from those beliefs are entitled to the same amount of protection under the Free Exercise Clause. At one point, the Court made a distinction between religious beliefs and actions, indicating that the government could never interfere with belief or opinion, but could always regulate practices. This distinction did not hold, as the Court has provided protection for such religious conduct as soliciting contributions, and of course, observing one's chosen Sabbath, or refusing to work on armaments.

There remains the question of which religious conduct may not be burdened (and thus must be accommodated unless a compelling interest justifies it), by government action. One theory would draw the line between actions that are compelled or dictated by religious belief and those that are merely motivated or influenced by these beliefs. "Not all actions are necessarily required (duties) or forbidden (sins); religion addresses what is 'better' as well as what is 'good.' " Michael McConnell, Accommodation of Religion, [1985] S.Ct.Rev. 1, 27 (discussing permissive rather than mandatory accommodation).

The most expansive view of the Free Exercise Clause would be to scrutinize any governmental burden on any activity that is arguably religious and require a balancing test between the government's interest and the burden on the activity. However, the Supreme Court has never gone so far, especially in the context of the public schools....

For me, the key fact is that the Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims. West Virginia State Board of Education v. Barnette may be the only case, and even there a specific affirmation was required, implicating a non-religious First Amendment basis, as well.

From a common sense view of the word "burden," Sherbert and Thomas are very strong cases for plaintiffs. In any sensible meaning of a burden, the burden in our case is greater than in Thomas or Sherbert. Both of these cases involved workers who wanted unemployment compensation because they gave up jobs based on their religious beliefs. Their actual losses that the Court made good, the actual burden that the Court lifted, was one or two thousand dollars at most. Although this amount of money was certainly important to them, the Court did not give them their jobs back. The Court did not guarantee they would get any future job. It only provided them access to a sum of money equally with those who quit work for other "good cause" reasons.

Here, the burden is many years of education, being required to study books that, in plaintiffs' view, systematically undervalue, contradict and ignore their religion. I trust it is not simply because I am chronologically somewhat closer than my colleagues to the status of the students involved here that I interpret the choice forced upon the plaintiffs here as a "burden."

VI

However, constitutional adjudication, especially for a lower court, is not simply a matter of common sense use of words. We must determine whether the common sense burden on plaintiffs' religious belief is, in the context of a public school curriculum, a constitutional "burden" on their religious beliefs.

I do not support an extension by this court of the principles of Sherbert and Thomas to cover this case, even though there is a much stronger economic compulsion exercised by public schooling than by any unemployment compensation system. I think the constitutional basis for those cases is sufficiently thin that they should not be extended blindly. The exercise there was of a narrow sort, and did not explicitly implicate the purposes or methods of the program itself.

Running a public school system of today's magnitude is quite a different proposition. 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….

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….

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.

Discussion

1. Does the fact that Tennessee allows home education and other forms of schooling that clearly do not use the Holt Rinehart series belie any claim that it has a "compelling state interest" (or even a less weighty interest) in foisting the series on every Tennessee youth who attends the public schools?

2. What precisely constitutes a "burden" on free exercise of religion? Even if one agrees with the majority in *Mozert* that a "burden" is limited to required affirmations of belief or engaging in proscribed behavior, is it necessarily true that being forced to read objectionable materials is not a form of behavior? (Must the limbs move in order for something to constitute behavior?) What if the consequence of reading certain material is thought to be divine punishment? Consider Judge Boggs's reference to the Index of prohibited books promulated by the (pre-Vatican II) Catholic Church, where it was regarded as a sin to read certain material. Would a Catholic plaintiff have a right to be exempt from

reading a forbidden book, or could such a plaintiff in effect be forced to go a religious school if he or she wished to avoid theologically forbidden materials?