

1949

## Busses, Released Time and the Political Process

James L. Burke S.J.

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

James L. Burke S.J., *Busses, Released Time and the Political Process*, 32 Marq. L. Rev. 179 (1948).  
Available at: <https://scholarship.law.marquette.edu/mulr/vol32/iss3/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

BUSSES, RELEASED TIME AND  
THE POLITICAL PROCESS\*

JAMES L. BURKE, S.J.

I have chosen to discuss two of the many problems connected with the two recent Supreme Court decisions based on the "liberty from the establishment of religion" as transferred from the First Amendment to the general word liberty in the 14th Amendment.<sup>1</sup> The first problem is a reply from history to what is set forth by the Supreme Court as an exposition from history of the amplitude of this expression. The second problem deals with a questionable reaction to the jurisdiction of the United States Supreme Court under the due process of law clause over an arrangement of matters brought about amicably by a local majority and enjoying the approbation of the State courts.

The first problem has been fairly widely expounded. I consider its best brief exposition to be that of a Woodstock theologian, Mr. Francis Canavan, S.J., which appeared in *America* for November 22, 1947. Fr. John Courtney Murray in his various articles on all the facets of the problem of civil authority and religious forces, Fr. Robert Hartnett and Fr. Wilfrid Parsons have also dealt with this same subject.<sup>2</sup>

Both Justices Black and Rutledge in the majority and minority opinions in the *Everson* Case relied almost exclusively on historical arguments to expound the amplitude of "no law respecting the establishment of religion." Both rely on what can honestly be said to be true but inapposite historical data. Their historical foundation is essentially what James Madison thought and did about the separation not merely of church and state but of political authority and religious forces in Virginia. All that they say of Madison's beliefs and actions in Virginia to segregate the two is undoubtedly true. To this they might also have added Madison's views as set forth in the recently published "Detached Memorandum" without in the least making these views of Madison

\*Reprinted from the Jesuit Educational Quarterly, June, 1948.

<sup>1</sup> An account of the process whereby certain liberties of the first eight amendments have been included under the term "liberty" in the Fourteenth Amendment may be found in the author's "The Founding Fathers and the Bill of Rights" in *Phases of American Culture* (Rev. C. E. Sloane, S.J., ed.; Worcester: Holy Cross College Press, 1942).

<sup>2</sup> For the most recent extended account of the historical, legal, and philosophical aspects of this problem, cf. Rev. Wilfred Parsons, S.J., *The First Freedom* (New York: Declan McMullen, 1948).

constitutionally germane. Mr. Irving Brant in his recent second volume on Madison, like the Supreme Court, has also *assumed* that these earlier Virginia views of Madison are necessarily inherent in the no-establishment clause of the First Amendment. For it is the unproved assumption of both Mr. Brant and the Supreme Court that Madison's private-views and public actions in Virginia, 1784-6, are the touchstone of the constitutional interpretation of the First Amendment.

How can this assumption be denied, it might be asked, since it was Madison himself who introduced into Congress what is now the First Amendment? Madison in introducing this and several other proposals was merely attempting to make good the promises of the supporters of the new constitution to propose as amendments what certain states had suggested as the price for their ratification of the Constitution.<sup>3</sup> It was not a case of Madison introducing this religious clause as his own personal idea. If we had no account of the congressional debates on the formulation of the no-establishment clause, we *might* assume that its words were measured by the sense in which Madison stood for separation in Virginia from 1784-6. Fortunately there is evidence—if not in abundance—of the sense in which these words were accepted by Congress when it proposed this amendment to the states.

In its primitive form the proposal read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national (sic) religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretexts, infringed." (Cf. Annals I, p. 434-June 8, 1790). This text along with texts of other proposed amendments went to a Select Committee on Tuesday, July 21. When referred back to Congress on August 15th, the proposal in question read, "No religion [N.B. national is omitted] shall be established by law, nor shall the equal right of conscience be infringed." (Cf. Annals I, p. 729-August 15). On these words the entire extant debate ensued. (Cf. Annals I, 729-731-August 15). Sylvester of New York feared that these words might be misconstrued to abolish religion altogether. Gerry of Massachusetts felt it more appropriate to say that "no religious doctrine shall be established by Law." Carroll of Maryland favored the committee's phraseology on the score that dissenters, now disgruntled with the constitution, might be won over by learning that no *one* religion could be established by Congress to the disadvantage of others. The plain assumption in these three utterances is that the words were intended to oppose the exclusive establishment of one

<sup>3</sup> The form in which Virginia suggested the no-establishment clause may be found in Jonathan Eliot, *Debates in the several State Conventions on the adoption of the Federal Constitution* (5 vols.; Phil.: Lippincott and Co., 1859), III, p. 659: "... that no particular religious sect or society ought to be favored or established, by law, in preference to others."

religious faith, not that they commanded a divorce between government and religion in all its moods and tenses.

At this point Madison, on whose Virginia ideas the Supreme Court case is made to rest, joined the congressional debate.

"Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience . . . to prevent these effects [fear that without it the national government could make laws infringing rights of conscience and establishing a national religion] he presumed the amendment was intended, and he thought it was as well expressed as the nature of the language would admit." [Annals I, 730]

Huntington, though agreeing with Madison's views, feared that they "might be taken in such latitude as to be extremely hurtful to the cause of religion." In the course of his statement Huntington expressed the one thought which Justice Rutledge in the *Everson* dissent thought historically meaningful in this entire legislative history. Huntington pointed out that in New England, financial contributions to churches were regulated by law and were actionable in courts. He wondered whether as a result of this clause federal courts would be denied jurisdiction to vindicate such pledges. Would it not be possible that "support of ministers or building of places of worship" might be construed into a prohibited religious establishment. Some modification of the words, Huntington thought, was necessary if they were not to "patronize those who professed no religion at all." Prescient words in view of Mrs. McCullum.

Did Madison's reply indicate that this total segregation was just what the words meant? If he were as bent on divorcing the State and religion forces, as his admirers maintain, or on denying the use of the secular arm to assist religious forces, here was his opportunity to say so clearly and frankly. All of Mr. Huntington's fears could be removed, replied Madison, if the committee's words were kept, and if the word "national" were re-inserted before the word religion as it had been inserted there in his original draft. For, argued Madison, all that the "no-establishment" clause had in mind was to lay to rest the fear that one sect or two sects in combination would get such numerical predominance that they could compel others to conform. Such was Madison's exposition at a time when his exposition was legally pertinent. Yet Madison elucidating on this matter in Congress is never recognized nor allowed a chance to open his mouth in the Supreme Court opinions which purport to give an authoritative historical exposition of the no-establishment clause.

If it was disappointing to have several columns in the *Everson* opinions given over to the Virginia Madison to the exclusion of Congress-

man Madison, it was much more disheartening to read the short shrift which Justice Black for the *McCullum* majority gave to the request that the historical significance of this clause be re-examined.

"Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. . . . After giving full consideration to the arguments presented [to this point and to a contention not here germane as to whether the no-establishment clause can be transferred to the First Amendment] we are unable to accept either of these contentions." Period. No factual grounds, just the bare assertion that the no-establishment clause, historically, is broad in its amplitude—no aid to one religion or to all.

That there may have been some non-articulate members of the first Congress who were of the secularistic views of the Virginia Madison may be the explanation of one odd development in the course of the voting in the First Congress. Samuel Livermore of New Hampshire sponsored a substitute form of the amendment: "Congress shall make no laws *touching* religion, or infringing the rights of conscience." This proposal received 31 votes with only 20 votes against it, but not the necessary two-thirds, i.e., 34, which favorable formulation of an amendment required. Although every spoken difficulty, observation and answer stated or implied that a narrow amplitude was to be given to the no-establishment clause, Livermore's resolution—if its words are to be interpreted literally—lends some weight to the boarder view. But this broader view, I repeat, did not command the required constitutional two-thirds strength.

On August 20 the House passed the Amendment in the following form: "Congress shall make no law establishing religion or to prevent the free exercise thereof, or to infringe the rights of conscience."

In what form the Senate discussion began or how modifications were made is unknown historically. The form in which the pertinent section came to the House for conference is this: "Congress shall make no law establishing articles of faith or a mode of worship. . ." This language quite clearly shows that the Senate's purpose was to outlaw an exclusive religious establishment, not to outlaw aid for public purposes even though religious forces are assisted.

The joint conference committee of the First Congress compromised not ideas but phraseology; its product is the current form of Amendment One. This history, all groups of the Supreme Court notwithstanding, shows that what was banned was not the aiding of religion, but the imposing of one religious faith or worship on the people to the exclusion of others.

It is curious, therefore, after this survey of the only pertinent history to read what Mr. Justice Black in the *Everson* Case asserted as the minimum meaning which history gave to this clause:

"Neither a State nor the Federal government can set up a church. Neither can pass laws which aid one religion, *aid all religions* [this is the illegitimate historical conclusion], or prefer one religion over another. . . . 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." (Brackets mine)

This principle with its wide coverage cannot be drawn from the legislative history of the First Amendment.

From such a principle, allegedly based on pertinent, non-controvertible historical data, it is much *easier* to understand last year's *Everson's* 4-5 minority opinion and this year's 8-1 *McCormack* majority opinion than last years 5-4 majority opinion in the *Everson* Case. Yet I believe that the practical consequence of the *Everson* majority opinion can be justified in recalling that the tax-money in question as a matter of fact was expended not "to aid" religious activities or institutions of set purpose, but to promote a legitimate public [at least non-private] purpose even though aid to religious activities or institutions was a close-knit and substantial by-product.<sup>4</sup> Since at present we have only that distinction on which to rest non-discriminatory governmental services to religious groups, I think it is better to see its good point rather than to join its foes in ridiculing this distinction.

The remaining point in this historical exposition had been prepared before its fundamental approach was employed by the only real dissenter to the broad amplitude of the no-establishment clause—Mr. Justice Reed. The argument here presented rests on what the Supreme Court calls practical constitutional construction, especially practical constitutional construction which is early and extended. Its rationale in constitutional argumentation was once well stated by Mr. Chief Justice Taft in the *Meyer's* case.<sup>5</sup>

"This court has repeatedly laid down the principle that a contemporaneous legislative exposition of our Constitution when the founders of the government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years, fixes the construction to be given its provisions. . . ."

<sup>4</sup> This appears to be the manner in which Mr. Justice Reed understands the expression: aid all religions. A comment on this aspect of Reed's dissent may be found in the June, 1948 issue of *Thought* under the title "Reflections on the Champaign Case."

<sup>5</sup> This norm of constitutional interpretation is contained in Taft's majority opinion in the 1926 decision on the ouster power of the President of the U.S. Cf. 272 U.S. 52, 175 (1926).

What the very first Congress believed that it was not forbidden to do under the no-establishment clause is clear from the appointment by both House and Senate of official congressional chaplains. They were voted for, it is true, before the First Amendment was formulated and adopted, but no subsequent change was made on the score that their appointment had violated its ban. It was the same men, too, who voted for congressional chaplains and for the First Amendment. As early as 1797, Congress voted for consular relations with Papal States and this relationship lasted until 1870. Diplomatic relationships, it should be observed, began with executive proposal and formal congressional approval only in 1848 when Polk was President.<sup>6</sup> The two early congressional actions—provision for chaplains in Congress and initiation of consular relationships with the Papal States—show that those who made practical decisions on what was within constitutional limitations considered the First Amendment no barrier to this kind of relationships between the United States and religious offices and institutions.

If, too, it was so evident verbally or historically from the no-establishment clause that no public funds could be given in a general, non-discriminatory way to foster religion, it is difficult to explain the repeated and unsuccessful efforts of some congressmen from 1875 on to amend the Constitution so that it would ban all use of federal public moneys for any kind of sectarian use. These efforts *imply* that such a ban was not then in the Constitution. They establish, too, that when, on the plane of policy, this ban was attempted, the efforts were in vain.

The Supreme Court, it is true, is not obliged to sanction even long-adhered to practices if these are *clearly* contrary to explicit constitutional limitations. If today the Court is to hold that it cannot presume the legitimacy of such legislative practices where a basic civil liberty is involved, as it might so presume where a procedural or economic liberty is involved, it should be more skillful historically in establishing the fact that a basic liberty is involved. Without the aid of pertinent history, the Court is now defending against presumptively valid legislative action freedom *from* religion and not merely freedom from state-imposed religious orthodoxy. I mention this rule of constitutional construction, which is best set forth in *Thomas v. Collins*,<sup>7</sup> because so competent a constitutional expert as Mr. Dowling of Columbia Law School told one of our fathers that the dissenting opinion in the *Everson* case was more constitutionally valid than the majority opinion. His proof

<sup>6</sup> For a valuable essay on this consular and diplomatic relationship between the U.S. and the Papal States, cf. Rev. Joseph A. Thorning, "American Notes in Vatican Diplomacy," *Historical Records and Studies*, XX (1931), 1-27.

<sup>7</sup> *Thomas v. Collins* (232 U.S. 516, 530) gives this exposition of the "more-preferred position" theory in regard to basic liberties. "For these reasons any attempt to restrict those liberties (contained in the First Amendment) must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy

was that it is the task of the court never to yield to presumptions of constitutionality when a basic liberty would be impaired. The whole point in controversy, however, is not the validity of this rule against constitutional presumption in such a case, but whether as a matter of *fact* the alleged basic liberty is a constitutional liberty with any solid and pertinent historical grounding. That it is not such a liberty, is our precise and often-repeated point.

I now turn to the matter of a current reaction to this decision which on historical grounds has apotheosized no-establishment of religion. Might I suggest that we have in the *grounds* of last year's decision and in both the *grounds* and the *conclusion* of this year's decision a situation similar to what labor and liberal elements in this country faced in the matter of liberty of contract from the time of *Lochner v. N.Y.* in 1905 to the *Tipaldo* Case in 1936. Valid liberty of contract, which would be protected by federal courts under the same due process of law clause that now covers genuine religious freedom, had been so enlarged by a series of Supreme Court decisions that it was able to strike down rather than to aid and protect clear rights. On the score that social legislation impinged improperly on liberty of contract, yellow-dog contracts were given free rein, and the most reasonable of minimum wage and maximum hour laws were declared automatically unreasonable and therefore, unconstitutional.

What was one reaction of labor and liberal elements to these parallel cases where there was a majority legislative agreement on state social legislation, where state courts had upheld this policy as valid, but where the U.S. Supreme Court under the due process of law clause struck this legislation down by its laissez faire sword of liberty of contract? It was to work either for a new constitutional theory or for a new constitutional amendment which would deprive the Supreme Court of its authority to invalidate state laws by the use of substantive due process of law, i.e., the power to invalidate laws as clearly unreasonable or arbitrary in relation to life, liberty and property. This effort to deprive the Supreme Court of all substantive due process of law authority would of course, also deprive it of authority to protect against contemporary state majorities all the other liberties which are contained in the word liberty. It would mean—to speak of a matter with religious connotation—that there would be no power in the Supreme Court to invalidate an Oregon law forcing all children to attend public schools. There are at least 7 substantive liberties found in the first eight Amend-

---

provided and the evil to be curbed which in other contexts might support legislation against attack on due process ground, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussions and persuasion, at appropriate time and places, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitations."



ments and many more substantive ones contained on judicial understanding in the general word "liberty" in the 14th Amendment. All of these would be left to the mercy of contemporary majorities in the states if substantive due process was removed. Yet this was the remedy often advocated by labor and labor's friends to get around certain unjustifiable decisions; but fortunately the remedy was never realized.

Should religious people follow a similar course? Because—at least for the immediate future—a secularist concept of liberty from religion has been ensconced with the general term 'liberty' in the Fourteenth Amendment should they support a theory, whereby this and all valid liberties would be cut off from federal judicial vindication? For a long period of time there has been a doctrine enunciated in political theory and in some Supreme Court decisions that political rather than judicial remedies should be relied upon to protect liberty and to vindicate justice. Instead of having federal courts of law serve ultimately "as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement," we would entrust our liberties exclusively to the political processes. Thus it would come about that the "power of the people in the states would not be fettered, their sense of responsibility lessened and their capacity for sober and restrained self-government weakened" by federal judicial protection of liberty and justice. Zeal for state experimentation on basic rights shows a callousness to liberty and to justice. For every village Hampden that can be pointed out to glorify the political process, there can also be found a village Kessler.

As a professor of constitutional law in a Catholic college, I have praised the judicial history whereby liberty is protected in federal courts even when local communities for laudable purposes wanted shortcuts around liberty. I have tried to have pupils see that fundamental liberties (even procedural ones) are too valuable to leave exposed even to allegedly enlightened political majorities or to state courts often not too judicially independent. Before espousing proposals—because of one misdeed—to strip the U.S. Supreme Court of its substantive due process of law authority vis-a-vis life, liberty and property, I would like to see the consequences carefully weighed.

In numerous judicial opinions attention is often called to the fact that, if one or two competing interpretations is followed in preference to the other, serious and unpleasant consequences will follow. At times, these listings of consequences are far-fetched. Then it is correct to refer to them invidiously as a judicial parade of horrors. But not every enumeration of serious consequences inherent in a poor choice of two competing possibilities is a parade of the horrors in this pejorative sense. Let me name a few of the liberties which would be left

solely to state political processes rather than to possible federal vindication if due process were emptied of all its content except its most general procedural due process of law. Gone from even the possibility of Supreme Court vindication would be the following liberties vis-a-vis state power: freedom of petition, assembly, press and speech, fairness of trial, effective employment of counsel in criminal cases, freedom of religious worship, of religious exposition, association and conscience, freedom to educate children in non-public schools. All of these and many more lapse, we might just as well recognize, if we are to urge with some economic journals and religious magazines that local matters should be for the future outside the vindicative authority of the U.S. Supreme Court and left exclusively to the realm of state majority policy. Instead of urging such an emptying of the vessel of due process of law, we should be striving to support the view that every genuine liberty should be as untrammelled as valid public purposes will permit.

Mr. Justice Frankfurter, who believes somewhat strongly in the preference of political over judicial protection of liberty, but who would at least safeguard the channels of communication (freedom of expression and freedom of elections) against untoward majority policy, must smile when he sees how one historically ungrounded interpretation of the Supreme Court brings him such strange bedfellows. With keen satisfaction he and others, who favor making as many as possible of our burning questions into policy-matters exclusively, will be pleased when editorials in Catholic journals re-echo such statements of his as:

"Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—*so long as the remedial channels of the democratic process remain open and unobstructed*—when it is ingrained in a people's habits and not enforced against *popular policy* by the coercion of adjudicated law." *Minersville School District v. Gobitis*, 310 U. S. 586, 599 (1940). (Italics mine.)<sup>8</sup>

In advocating such ideas in American jurisprudence we shall have emptied out of public law its great natural law content in the name of saving the natural law. It is still true that the best propaganda device to rid law of religion must somehow guise itself in the language of religion if it is to prevail. I trust that such a crusade will not succeed. With all the moral and intellectual earnestness of which I am capable, might I urge Catholics at least to think twice before they lead a parade to Mr. Frankfurter's judicial bed-chamber.

<sup>8</sup> That the saving-clause in this quotation, "except where the transgression of constitutional liberty is too plain for argument," cannot always be taken at its face value appears to be evident from Mr. Frankfurter's dissent in *U.S. v. Lovett*, 328 U.S. 303, 319-330 (1946). That even the electioneering process need not be too sedulously safeguarded by court review against restrictive legislation appears from the division of the Supreme Court in *United Public Workers v. Mitchell*, 67 S.C. 556 (1947).