Marquette Law Review

Volume 47
Issue 3 *Winter 1963-1964*

Article 5

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THE ESTABLISHMENT CLAUSE AND "COERCION"

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Considering the numerous factual situations wherein the Supreme Court could have found violation of the first amendment's establishment clause, as it is absorbed by the fourteenth amendment, it is significant that the Court to date has found violation on only three occasions.[1] It is significant that these violations have basic similarities, and the decisions are fairly recent. Although the decisions purport to rest solely on the establishment clause, manifestations of the free exercise clause appear necessary to buttress and explain the Court's decisions. "Establishment" in 1963 still finds it difficult to stand squarely on its own. The three decisions all involve elementary school children attending public schools wherein religious exercises were required or permitted by state or local authority on school property with the right of excusal on the part of those whose parents did not desire their participation. The children in each instance were required to attend school by virtue of a compulsory school attendance law.

The Court's initial concern with "liberty" under the due process clause of the fourteenth amendment centered around "liberty of contract" as it helped to protect property rights. It was not until 1925 that the Court began the piece-meal incorporation of first amendment freedoms into the fourteenth amendment with "establishment" being the last. ". . . [T]he central issue posed by the twentieth century for our system of free expression is the development of methods for maintaining that system, not as a self-adjusting by-product of laissez-faire, but as a positive and deliberate function of the social process."[2] In 1925 the Court proclaimed that free speech was a "liberty" under the fourteenth amendment.[3] It then added the press when it said, "It is no longer open to doubt that the liberty of press . . . is within the liberty safeguarded by the due process clause of the Fourteenth from invasion by state action."[4] Free assembly attained status next when the Court said, "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[5] *Cantwell v. Connecticut*,[6]

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[1] Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township, Pa. v. Schempp, —U.S.—, 83 Sup. Ct. 1560 (1963).

[2] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 904 (1963).

[3] Gitlow v. New York, 268 U.S. 652 (1925).

[4] Near v. Minnesota, 283 U.S. 697, 707 (1931).

[5] DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

[6] Cantwell v. Connecticut, 310 U.S. 296 (1940).

decided on free exercise grounds, added freedom of religion, and as a matter of dictum mentioned "establishment" as being included in the fourteenth. Speech, press, assembly, and the free exercise of religion became firmly established, usually alone, but sometimes in conjunction, as fundamental liberties incorporated in due process.

It was not until *Everson v. Board of Education*[7] that the Court gave any real substance or meaning to the establishment clause, and then it did so only as a matter of dictum. The basis for the decision was that "New Jersey cannot hamper its citizens in the free exercise of their own religion."[8] Public welfare benefits cannot be denied to persons because of what they believe or don't believe. The Court, in limiting the government's involvement in the establishment of religion, included:

> Neither [referring to a state or the federal government] can force nor influence a person to go to 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 nonattendance.[5] (Material in parenthesis added)

The Court's initial decision, then, as to what elements should be considered in determining whether there was a law establishing a religion, included matters which more easily could explain one's right freely to practice his religious beliefs without coercion or compulsion. The Court's ultimate ruling was on a free exercise basis.

The Court, in *School District of Abington Township, Pa. v. Schempp,* definitively stated:

> Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.[10]

Yet the only three "establishment" cases[11] decided by the Court on a state level had such strong overtones of coercion that one would be lead to believe that "coercion," the basic element in the free exercise cases, is also of some importance in "establishment," and that the Court has yet to decide an establishment case without the prop of "free exercise" to give it support.

In *Illinois ex. rel. McCollum v. Board of Education*[12] pupils not agreeing to take a course in religious instruction were required to leave

[7] Everson v. Board of Education, 330 U.S. 1 (1947).
[8] *Id.* at 16.
[9] *Id.* at 15.
[10] —U.S.—, 83 Sup. Ct. 1560, 1572 (1963).
[11] Cases cited note 1 *supra.*
[12] 333 U.S. 203 (1948).

the public school classroom in favor of those who desired to attend classes in religion. Illinois had a compulsory school attendance law. The case was decided on the basis that the use of school buildings and of compulsory school machinery to help acquire students violated the establishment clause. One detects "free exercise" violation in compelling a student to leave his regular classroom because his beliefs differ from, and he does not want the religious instruction offered to, those who remain.

In *Zorach v. Clauson,*[13] decided on the basis that the state did not violate the establishment clause in allowing students to be dismissed from class for the purpose of taking religious instruction off the premises, the Court did not appear to be ignoring the free exercise clause when it said:

> We guarantee the freedom to worship as one chooses. . . . Government . . . may not use secular institutions to force one or some religion on any person. . . . The government must be neutral when it comes to competition between the sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.[14]

Appellants had no standing to assert their free exercise claims, but they did have standing to assert their establishment claim in *McGowan v. Maryland.*[15] The Court distinguished this case from *McCollum,*[16] the only case in which the establishment clause had been found to be violated up to that time, by saying that the system of state action in *McCollum* "had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar."[17] Coercion, an important factor in determining whether one is being allowed to freely practice his religion, is here used as a basis for deciding that religion had not been established in one case but had been established in the other. A law requiring closing on Sunday did not coerce attendance at religious functions in *McGowan,* but a released time program did coerce attendance at religious functions in *McCollum.*

The Court in the *"Regents Prayer Case," Engel v. Vitale,*[18] said it was deciding the case on the establishment clause, but it also said:

> This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the

[13] 343 U.S. 306 (1952).
[14] *Id.* at 313 and 314.
[15] 366 U.S. 420 (1961).
[16] 333 U.S. 203 (1948).
[17] 366 U.S. at 452.
[18] 370 U.S. 421 (1962).

indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.[19]

School District of Abington Township, Pa. v. Schempp was combined with *Murray v. Curlett* and decided by the Supreme Court on June 17, 1963.[20] The first involved a Pennsylvania statute requiring Bible reading in the public schools, and the second concerned a rule adopted pursuant to a Maryland statute, which required the reading of the Bible or the Lord's Prayer in the public schools. Testimony had been introduced in the trial court in *Schempp* showing that the father of the school children concerned, a Unitarian, had decided he would not have his children excused even though a specific provision was made for excusal. He said he did not wish to have his children's relationships with teachers and classmates disturbed; that he did not wish to have his children labeled "odd-balls," "atheists," "communists," or "un-American"[21]; that he did not wish his children excused because that might cause them to miss important announcements; and that the children would have to stand in the hall which might be interpreted as punishment for bad conduct. In the Maryland case, petitioners, atheists, claimed violation of their religious liberty. They said the Maryland requirements promoted doubt as to the morality, good citizenship, and good faith of the petitioners.[22] Coercion was not, however, directly proven as to the individual students involved in either case.

It is interesting to note aspects of coercion indicated in dicta by the various justices supporting the ban on the promotion of the religious exercises in the school. Only Mr. Justice Stewart dissented. The majority opinion granted that there was no compulsion on the teacher to read the Bible or recite the Lord's Prayer, but it questioned whether her contract would be renewed for "violation of school laws."[23] Mr. Justice Douglas, in his concurrence, said that, "Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others."[24] Mr. Justice Brennan, in his concurring opinion, stated that "the complaint in every case thus far challenging an establishment has set forth at least a colorable claim of infringement of free exercise" and that the parents had real grievances sufficient to give them standing even without a showing as to the monetary cost of the exercise.[25] Expert testimony was introduced in *Schempp* to the effect that

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[19] *Id.* at 430.
[20] School District of Abington, Pa. v. Schempp, —U.S.—, 83 Sup. Ct. 1560 (1963).
[21] *Id.* at 1564 n. 3.
[22] *Id.* at 1566.
[23] *Id.* at 1563 n. 2.
[24] *Id.* at 1575.
[25] *Id.* at 1594 n. 30.

reading portions of the New Testament, without explanation, tended to bring the Jews into ridicule or scorn.[26]

The majority opinion in *Schempp* says 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."[27] Granted that this is a test for determining whether a law has been passed establishing a religion, it is difficult to see how, if the law did have a primary effect of inhibiting religion, it would not also impair, to some degree, the religious freedom of those professing to follow the religion inhibited. To the extent that one's religion is stultified, weakened, or impaired, his ability to practice his religion to the fullest extent, using all its resources, would be impaired. A religion consists of the common beliefs of the individuals pursuing the same. To the extent that it is frustrated by state action, so are all those persons frustrated who profess to promote and advance that religion. Restraint of the whole is restraint of its component parts.

Mr. Justice Brennan's separate concurrence attempts the answer as to whether *Schempp* can be answered solely on the basis of the establishment clause or whether the excusal provision calls for a decision under the free exercise clause. His opinion would seem to assume a dichotomy between the two clauses, with a consideration of both being necessary, however, when there is a provision for excusing the child from the religious services. He says that reading the Bible and reciting the Lord's Prayer are religious practices designed "at least in part to achieve religious aims through the use of public school facilities during the school day" and that "the availability of excusal or exemption has no relevance to the establishment question."[28] If there had been no excusal privilege, "free exercise" would have become enmeshed with "establishment" since the children would have to participate against their will, at least silently, in a religious exercise ordered by governmental authority.

Where there is excusal, the exercise of the privilege, since it requires a public expression of disbelief, before the constitutional rights of abstention can be exercised, violates "free exercise." The requiring of conditions, however innocent or harmless, before one can exercise a constitutional right, is impermissible. It tends, certainly in the case of children who as a group tend to conform, to place the children in a dilemma. If they exercise their constitutional right to be excused, they are labeled as at least questionable. If they forego the constitutional right, they will receive acceptance of the group. This would tend to discriminate against and make unequal those excused. Further, where

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[26] *Id.* at 1564.
[27] *Id.* at 1571.
[28] *Id.* at 1606.

the right to be excused is of a constitutional nature, the children should not have to avail themselves of the excusal procedure and find it inadequate before they can claim the right.[29] These are the arguments Mr. Justice Brennan advances to show excusal cannot be required constitutionally without violating the free exercise clause. Whether excusal or not, the two clauses should be considered together in this type of case. Where the student can't be excused, he has no alternative, and coercion is present. Where he can be excused, he has an unconstitutional alternative, and coercion and pressure are present. "The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."[30]

The *Schempp* majority recognizes a number of permissible religious practices that are publicly sponsored or paid for.[31] But it is Mr. Justice Brennan's lengthy concurring opinion, setting forth the neutrality position, which illustrates how coercion considerations may outweigh establishment considerations in determining that certain forms of aid are permissible.

Mr. Justice Brennan's concurrence, contrasted with Mr. Justice Douglas' concurrence in *Engel v. Vitale*[32] setting forth the absolutist position, may be at least a partial explanation for the quiet public acceptance of *Schempp* as compared to the angry public disapproval of *Engel.*

Churches and chaplains at military installations, draft exemption for ministers, and excusal of children on their religious holidays are probably the prime examples of the interaction of "establishment" and "free exercise." Abolish the practice and religious freedom suffers. Religious freedom does not here give way to the establishment clause.[33] Prayers before governmental bodies involve mature adults who can absent themselves without penalty, direct or indirect.[34] Lack of compulsion and grown individuals, as opposed to children attending school under compulsory laws with the threat of not being accepted if they do not conform, make the difference. Teaching about religion, rather than teaching religion, is permissible since "to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with dangers."[35] Tax deductions benefiting nonprofit organizations, including religious institutions, are permissible.[36] Denying tax exemption to religious nonprofit organizations and to individuals contributing to such organizations might very well be discriminatory as to

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[29] *Id.* at 1606-1609.
[30] Olmstead v. United States, 277 U.S. 438, 478 (1928).
[31] —U.S.—, 83 Sup. Ct. at 1566.
[32] 370 U.S. at 437.
[33] —U.S.—, 83 Sup. Ct. at 1610-1612.
[34] *Id.* at 1612.
[35] *Id.* at 1613.
[36] *Id.* at 1613.

the organization because it is religious and as to the individual because of his religious beliefs.

Mr. Justice Brennan recognizes "incidental aids to individual worshippers which come about as products of general and nondiscriminatory welfare programs,"[37] as for example, extending unemployment benefits to individuals who become unemployed because of religious beliefs. To deny these persons benefits would be to jeopardize their religious freedom in order to avoid establishing their beliefs by granting them unemployment compensation because they uphold those beliefs.[38]

Mr. Justice Goldberg, with Mr. Justice Harlan concurring, may well have explained the true nature of the religious guarantees:

> The First Amendment guarantees, as applied to the states through the Fourteenth Amendment, foreclose not only laws 'respecting an establishment of religion' but also those 'prohibiting the free exercise thereof.' These two proscriptions are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.[39]

One of the last cases decided at the last term of Court[40] concerned itself with an employee discharged from her employment because she refused to work on Saturday, the Sabbath Day of her faith. She filed a claim for unemployment compensation benefits, having failed to obtain employment because her religious scruples forbade her taking Saturday work. Her claim was denied. The Court decided the case solely on free exercise grounds finding that she was ineligible because of the practice of her religious beliefs, pressure on her to forego her religious practice being apparent. Mr. Justice Harlan, joined by Mr. Justice White in dissent, found direct financial assistance to religion and a violation of the establishment clause with no compulsion.[41] It is worth noting that the dissent in a dictum found "coercion" was an important factor in *Engel* and *Schempp* which cases it cited in stating: "The State violates its obligation of neutrality when . . . it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails."[42]

The Court has never adequately explained why "establishment" is a "liberty" protected by the fourteenth amendment. It may be that its doubts in that regard are responsible for the slow maturation of the establishment clause. Its uncertainties may explain why in only three

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[37] *Id.* at 1613.
[38] *Id.* at 1614.
[39] *Id.* at 1615.
[40] Sherbert v. Verner, —U.S.—, 83 Sup. Ct. 1790 (1963).
[41] *Id.* at 1801.
[42] *Id.* at 1804.

cases has the clause been used to invalidate state action, and then only where strong overtones of coercion, a facet of "free exercise," were present. Mr. Justice Brennan's concurring opinion in *Schempp* is an attempted answer to arguments that "establishment" cannot logically be incorporated in the fourteenth amendment. It is significant that he felt it advisable to present answers at this late date, 23 years after *Cantwell* first indicated it was a protected liberty.

It was argued that the framers of the establishment clause meant to deny any right on the part of Congress to disestablish state churches.[43] Mr. Justice Brennan's answer in *Schempp* is that state establishments were all dissolved at the time the fourteenth amendment was ratified, and the framers of that amendment could not be deemed to have less desire to absorb the establishment clause than the free exercise clause.[44]

Corwin has said that: "So far as the Fourteenth is concerned, states are entirely free to establish religions provided they do not deprive anyone of religious liberty. It is only liberty that the Fourteenth protects."[45] Mr. Justice Brennan answers: "The fallacy in this contention . . . is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty."[46] He further says there is "a freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress."[47]

The argument has been made that the states may furnish numerous forms of aid provided there is no formal establishment. The Justice goes back to 1853 to Senate Committee Reports to show that it was the understanding at that time that many forms of aid falling short of actual formal establishment are not permissible.[48]

The above arguments may indicate justification for status being given to the establishment clause equal to other first amendment clauses, but there are immeasurably stronger and better clarified precedents in "coercion" and "free exercise." Could it not be that the Court's initial incursions into the field in *Cantwell, Everson* and *McCollum* reflected the preferred position emphasizing the firstness of the first amendment which a majority of the Court accepted from 1943 to 1948? The Court, having encompassed the other provisions of the first amendment within the fourteenth, and having given them preferred status, could have used *Everson* and *McCollum* to round out the first amendment in its relationship to the fourteenth. It then receded from the preferred position

[43] Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371, 373-394.
[44] ——U.S.——, 83 Sup. Ct. at 1589.
[45] Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROB. 3, 19 (1949).
[46] ——U.S.——, 83 Sup. Ct. at 1589.
[47] *Id.* at 1589.
[48] *Id.* at 1591 n. 24.

leaving "establishment" as part of the fourteenth amendment not completely divorced from "free exercise."

Engel[49] and *Schempp* indicate a policy of weakened standing requirements in "establishment" cases. Coercion must be alleged and proved in a free exercise clause case but not in an establishment clause case. Although coercion is present in the latter type of case and bolsters and strenghthens the grounds for establishment violation, proof is not required. The day may not be far distant when allegation and proof of "establishment," totally devoid of any background of coercion, will be sufficient to eliminate the practice complained of. The establishment clause will then have matured. It is doubtful, however, that the praying mantis will summarily be ordered out of the biology laboratory as was done, tongue in cheek, in Chicago schools recently.[50]

[49] Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962).
[50] Newsweek, July 1, 1963, p. 48.