Supplementary Material

Chapter 8: The New Deal/Great Society Era—Individual Rights/Religion/Establishment

Everson v. Board of Education of Ewing Tp., 330 U.S. 1 (1947)

Arch R. Everson was a resident of Ewing, New Jersey, who objected to a board of education resolution reimbursing families for funds spent sending their children to public or non-profit private schools on public transportation. Noting that every non-profit private school in Ewing was affiliated with the Catholic Church, Everson claimed that the resolution violated the Establishment Clause of the First Amendment as incorporated by the Fourteenth Amendment. The board insisted that this was a general program that provided assistance to all children attending nonprofit schools. The local state court agreed with Everson, but the New Jersey Court of Errors and Appeals reversed that decision, finding that the Ewing policy did not violate the state or federal constitution. Everson appealed to the Supreme Court of the United States.

Everson *provided an occasion for a major struggle between interest groups concerned with state assistance to religious schools. The lawsuit appears to have been sponsored by the newly formed Protestants and Other Americans United for Separation of Church and State, an organization that would later become known as Americans United for Separation of Church and State. The ACLU submitted an amicus brief siding with Everson, as did the Seventh-Day Adventists and a coalition of Baptists. The brief for the latter insisted "aid to private parochial schools, not under the control of public school authorities, . . . will lead inevitably to some form of state control of such religious schools, and thus, more clearly and more certainly, encroach upon the cardinal principle of the separation of church and state." The National Council of Catholic Men and the National Council of Catholic Women submitted an amicus brief on behalf of the board of education. That brief insisted both that the program did not provide assistance per se to parochial schools, and that the assistance provided to families who sent their children to parochial schools did not violate constitutional norms. "Non-profit private schools including such schools as are conducted under denominational auspices fulfill a public function in every State of the Union," the brief declared.*

The Supreme Court by a 5-4 vote sustained the Ewing Township subsidy. Justice Black's majority opinion insisted that town officials had provided a general benefit to all citizens that some citizens used for religious purposes. The justices who decided Everson *agreed that elected officials could neither provide aid to particular religions nor to religion in general. Both Justice Rutledge and Justice Black insisted that was the proper historical view. Based on your reading of previous materials, is their claim historically correct? Is their claim at least a reasonable reading of that history? Given this agreement on general principles, why did the justices dispute applications? In particular, why did Justices Black and Rutledge disagree over whether the busing subsidy provided benefits to all citizens analogous to providing police protection to parochial schools as part of a program that provided police protection to all children? Rutledge insisted the resolution would be unconstitutional even if for-profit schools were included, so his reason was not that, as a matter of fact, the only assistance going to parents of private school children went to parents of parochial school children. Suppose Ewing had simply declared that all children could ride public buses for free during school days. Could anyone make a constitutional objection to that law?*

JUSTICE BLACK delivered the opinion of the Court.

[The first part of Black's opinion insisted that, for technical legal reasons, issues about whether Ewing Township would pay for busing expenses to for-profit public schools or to non-Catholic parochial schools were not properly before the Court.]

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. . . . With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.[1] In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. . . . Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters. These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. . . . The people . . . reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785–86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia. . . . When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson. The preamble to that Bill stated among other things that

> 'Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . '

And the statute itself enacted

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[1] See Tom Lehrer, "National Brotherhood Week," http://www.youtube.com/watch?v=aIlJ8ZCs4jY ("The Protestants hate the Catholics, and the Catholics hate the Protestants, and the Hindus hate the Muslims, and everybody hates the Jews").

'That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .'

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. . . .

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[In light of this history], [t]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." . . .

. . . New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief. Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. . . . Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. . . . Th[e First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

. . . .The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

JUSTICE JACKSON, dissenting.

. . . The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete

and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'

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. . . The Act permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit. . . . Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise. Thus, under the Act and resolution brought to us by this case children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.

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. . . [T]he basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. . . . But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. . . .

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. . . Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. . . . Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. . . .

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JUSTICE FRANKFURTER joins in this opinion.

JUSTICE RUTLEDGE, with whom JUSTICE FRANKFURTER, JUSTICE JACKSON and JUSTICE BURTON agree, dissenting.

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No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. . . .

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. . . Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support. Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. "Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. . . .

In no phase was [Madison] more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose.

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In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. . . .

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New Jersey's action . . . exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools. . . . And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

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An appropriation from the public treasury to pay the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies, such as the Y.M.C.A., the Y.W.C.A., the Y.M.H.A., the Epworth League, could not withstand the constitutional attack. This would be true, whether or not secular activities were mixed with the religious. If such an appropriation could not stand, then it is hard to see how one becomes valid for the same thing upon the more extended scale of daily instruction. Surely constitutionality does not turn on where or how often the mixed teaching occurs.

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. . . Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education. . . .

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. . . Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.

I have chosen to place my dissent upon the broad ground I think decisive, though strictly speaking the case might be decided on narrower issues. The New Jersey statute might be held invalid on its face for the exclusion of children who attend private, profit-making schools. I cannot assume, as does the majority, that the New Jersey courts would write off this explicit limitation from the statute. Moreover, the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools. There is no showing that there are no other private or religious schools in this populous district. I do not think it can be assumed there were none. But in the view I have taken, it is unnecessary to limit grounding to these matters. Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. . . . In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

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