CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Braunfeld v. Brown, 366 U.S. 599 (1961)

In *McGowan v. Maryland, ante,* at pp. 366 U. S. 437-440, we noted the significance that this Court has attributed to the development of religious freedom in Virginia in determining the scope of the First Amendment's protection. We observed that, when Virginia passed its Declaration of Rights in 1776, providing that "all men are equally entitled to the free exercise of religion," Virginia repealed its laws which in any way penalized "maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever." But Virginia retained its laws prohibiting Sunday labor.

Certain aspects of religious exercise cannot in any way be restricted or burdened by either federal or state legislation. **Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden.** The freedom to hold religious beliefs and opinions is absolute. *Cantwell v. Connecticut,* 310 U. S. 296, 310 U. S. 303; *Reynolds v. United States,* 98 U. S. 145, 98 U. S. 166. Thus, in *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell v. Connecticut, supra,* at pp. 310 U. S. 303-304, 310 U. S. 306. As pointed out in *Reynolds v. United States, supra,* at p. 98 U. S. 164, legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when

Page 366 U. S. 604

the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:

"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that *the legislative powers of government reach actions only, and not opinions*, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he *has no natural right in opposition to his social duties.*"

(Emphasis added.) 8 Works of Thomas Jefferson 113. [Footnote 2] And, in the *Barnette* case, the Court was careful to point out that

"The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. . . . It is . . . to be noted that the compulsory flag salute and

Page 366 U. S. 605

pledge requires *affirmation of a belief* and an *attitude of mind.*"

319 U.S. at 319 U. S. 630, 319 U. S. 633. (Emphasis added.)

This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom -- the freedom to believe and to practice strange and, it may be, foreign creeds -- has classically been one of the highest values of our society. *See, e.g., Murdock v. Pennsylvania,* 319 U. S. 105, 319 U. S. 115 (1943); *Jones v. City of Opelika,* 319 U. S. 103 (1943); *Martin v. City of Struthers,* 319 U. S. 141 (1943); *Follett v. Town of McCormick,* 321 U. S. 573 (1944); *Marsh v. Alabama,* 326 U. S. 501, 326 U. S. 510 (1946). **Even the most concentrated and fully articulated attack on this high standard has seemingly admitted its validity in principle, while**

Page 366 U. S. 613

deploring some incidental phraseology. *See Kovacs v. Cooper,* 336 U. S. 77, 336 U. S. 89, 336 U. S. 95-96 (1949) (concurring opinion); *but cf. Ullmann v. United States,* 350 U. S. 422 (1956). The honored place of religious freedom in our constitutional hierarchy, suggested long ago by the argument of counsel in *Permoli v. Municipality No. 1 of City of New Orleans,* 3 How. 589, 600 [argument of counsel –

omitted](1845), and foreshadowed by a prescient footnote in *United States v. Carolene Products Co.*, 304 U. S. 144, 304 U. S. 152 (1938), note 4, must now be taken to be settled. Or at least so it appeared until today. For, in this case, the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.

MR. JUSTICE STEWART, dissenting.

I agree with substantially all that MR. JUSTICE BRENNAN has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me, this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.