CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Welsh v. United States, 398 U.S. 333 (1970)

On the basis of these and similar assertions, the Government argued that Seeger's conscientious objection to war was not "religious" but stemmed from "essentially political, sociological, or philosophical views or a merely personal moral code."

In resolving the question whether Seeger and the other registrants in that case qualified for the exemption, the Court stated that "[the] task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." 380 U.S., at 185 (Emphasis added.) The reference to the registrant's **"own scheme of things"** was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life.

The Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of 6 (j) was as follows:

"The test might be stated in these words: ***A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."*** 380 U.S., at 176 .

The Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. It held that 6 (j) "does not distinguish between externally and internally derived beliefs," id., at 186, and also held that "intensely personal" convictions which some might find "incomprehensible" or "incorrect" come within the meaning of "religious belief" in the Act. Id., at 184-185. What is necessary under Seeger for a registrant's conscientious [398 U.S. 333, 340] objection to all war to be "religious" within the meaning of 6 (j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality - a God - who communicates to man in some way a consciousness of what is right and should be

done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under 6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

[Footnote 2] 62 Stat. 612. An amendment to the Act in 1967, subsequent to the Court's decision in the Seeger case, deleted the reference to a "Supreme Being" but continued to provide that "religious training and belief" does not include "essentially political, sociological, or philosophical views, or a merely personal moral code." 81 Stat. 104, 50 U.S.C. App. 456 (j) (1964 ed., Supp. IV).

[Footnote 2] The difference is between the substitution of judicial judgment for a principle that is set forth by the Constitution and legislature and the application of the legislative principle to a new "form" that is no different in substance from the circumstances that existed when the principle was set forth. Cf. Katz v. United States, 389 U.S. 347 (1967). As the Court said in Weems v. United States, "Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. 349, 373 (1910) (emphasis added). While it is by no means always simple to discern the difference between the residual principle in legislation that should be given effect in circumstances not covered by the express statutory terms and the limitation on that principle inherent in the same words, the Court in Seeger and the prevailing opinion today read out language that, in my view, plainly limits the principle rather than illustrates the policy and circumstances that were in mind when 6 (j) was enacted.

[Footnote 3] The substitution in 6 (j) of "Supreme Being" instead of "God" as used in Macintosh does not, in my view, carry the burden, placed on it in the Seeger opinion, of demonstrating that Congress "deliberately broadened" Chief Justice Hughes' definition. "God" and "Supreme Being" are generally taken as synonymous terms meaning Deity. It is common practice to use various synonyms for the Deity. The Declaration of Independence refers to "Nature's God," "Creator," "Supreme Judge of the world," and "divine Providence." References to the Deity in preambles to the state constitutions include, for example, and use interchangeably "God," "Almighty God," "Supreme Being." A. Stokes & L. Pfeffer, Church and State in the United States 561 (1964). In Davis v. Beason, 133 U.S. 333, 342 (1890), the Court spoke of man's relations to his "Creator" and to his "Maker"; in Zorach v. Clauson, 343 U.S. 306, 313 (1952), and Engel v. Vitale, 370 U.S. 421, 424 (1962), to the "Almighty."

[Footnote 6] The prevailing opinion's purported recognition of this distinction slides over the "personal moral code" exception, in 6 (j). Thus that opinion in concluding that 6 (j) does not exclude "those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy" but excludes individuals, whose beliefs are not deeply held, and those whose objection to war does not rest upon "moral, ethical, or religious principle," but

instead rests solely upon considerations of [398 U.S. 333, 353] "policy, pragmatism, or expediency," ante, at 342-343, blends morals and religion, two concepts that Congress chose to keep separate.

[Footnote 8] This Court has taken notice of the fact that recognized "religions" exist that "do not teach what would generally be considered a belief in the existence of God," Torcaso v. Watkins, 367 U.S. 488, 495 n. 11, e. g., "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." Ibid. See also Washington Ethical Society v. District of Columbia, 101 U.S. App. D.C. 371, 249 F.2d 127 (1957); 2 Encyclopaedia of the Social Sciences 293; J. Archer, Faiths Men Live By 120-138, 254-313 (2d ed. revised by Purinton 1958); Stokes & Pfeffer, supra, n. 3, at 560.

[Footnote 10] Without deciding what constitutes a definition of "religion" for First Amendment purposes it suffices to note that it means, in my view, at least the two conceivable readings of 6 (j) set forth in Part II, but something less than mere adherence to ethical or [398 U.S. 333, 359] moral beliefs in general or a certain belief such as conscientious objection. Thus the prevailing opinion's expansive reading of "religion" in 6 (j) does not, in my view, create an Establishment Clause problem in that it exempts all sincere objectors but does not exempt others, e. g., those who object to war on pragmatic grounds and contend that pragmatism is their creed.

[Footnote 11] Thus, Mr. Chief Justice White said: "And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more." 245 U.S., at 389 -390.

[Footnote 12] My Brother WHITE in dissent misinterprets, in my view, the thrust of Mr. Justice Frankfurter's language in the Sunday Closing Law Cases. See post, at 369. Section 6 (j) speaks directly to belief divorced entirely from conduct. It evinces a judgment that individuals who hold the beliefs set forth by the statute should not be required to bear arms, and the statutory belief that qualifies is only a religious belief. Under these circumstances I fail to see how this legislation has "any substantial legislative purpose" apart from honoring the conscience of individuals who oppose war on only religious grounds. I cannot, moreover, accept the view, implicit in the dissent, that Congress has any ultimate responsibility for construing the Constitution. It, like all other branches of government, is constricted by the Constitution and must conform its action to it. It is this Court, however, and not the Congress that is ultimately charged with the difficult responsibility of construing the First Amendment. The Court has held that universal conscription creates no free exercise problem, see cases cited, supra, at 356, and Congress can constitutionally draft individuals notwithstanding their religious beliefs. Congress, whether in response to political considerations or simply out of sensitivity for men of religious conscience, can of course decline to exercise its power to conscript to the fullest extent, but it cannot do so without equal regard for men of nonreligious conscience. It goes without saying that the First Amendment is perforce a guarantee that the conscience of religion may not be preferred simply because organized religious groups in general are more visible than the individual who practices morals and ethics on his own. Any view of the Free Exercise Clause that does not insist on this neutrality would engulf the Establishment Clause and render it vestigial.

[Footnote 15] In Iowa-Des Moines National Bank v. Bennett, Mr. Justice Brandeis speaking for the Court in a decision holding that the State had denied petitioners equal protection of the laws by taxing them more heavily than their competitors, observed that: "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." 284 U.S., at 247 . Based on the impracticality of requiring the aggrieved taxpayer at that stage to "assume the burden of seeking an increase of the taxes which . . . others should have paid," the Court held that petitioner was entitled to recover the overpayment. The Establishment Clause case that comes most readily to mind as involving "underinclusion" is Epperson v. Arkansas, 393 U.S. 97 (1968). There the State prohibited the teaching of evolutionist theory but "did not seek to excise from the curricula of its schools and universities all discussion of the origin of man." 393 U.S., at 109 . The Court held the Arkansas statute, which was framed as a prohibition, unconstitutional. Since the statute authorized no positive action, there was no occasion to consider the remedial problem. Cf. Fowler v. Rhode Island, 345 U.S. 67 (1953). Most of the other cases arising under the Establishment Clause have involved instances where the challenged legislation conferred a benefit on religious as well as secular institutions. See, e. g., Walz v. Tax Comm'n, supra; Everson v. Board of Education, supra; Board of Education v. Allen, supra. These cases, had they been decided differently, would still [398 U.S. 333, 363] not have presented the remedial problem that arises in the instant case, for they were cases of alleged "overinclusion." The school prayer cases, School District of Abington Township v. Schempp, supra; and Engel v. Vitale, supra; and the released-time cases, Zorach v. Clauson, supra; McCollum v. Board of Education, supra, also failed to raise the remedial issue. In the school prayer situation the requested relief was an injunction against the saying of prayers. Moreover it is doubtful that there is any analogous secular ritual that could be performed so as to satisfy the neutrality requirement of the First Amendment and even then the practice of saying prayers in schools would still offend the principle of voluntarism that must be satisfied in First Amendment cases. See my separate opinion in Walz v. Tax Comm'n, supra. The same considerations prevented the issue from arising in the one released-time program case that held the practice unconstitutional. In McCollum, where the Court held unconstitutional a program that permitted "religious teachers, employed by private religious groups . . . to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law," 333 U.S., at 205 , the relief requested was an order to mandamus the authorities to discontinue the program. No question arose as to whether the program might have been saved by extending a similar privilege to other students who wished extracurricular instruction in, for example, atheistic or secular ethics and morals. Cf. my separate opinion in Walz v. Tax Comm'n, supra. Moreover as in the prayer cases, since the defect in the Illinois program was not the mere absence of neutrality but also the encroachment on "voluntarism," see ibid., it is doubtful whether there existed any remedial alternative to voiding the entire program. A further complication would have arisen in these cases by virtue of the more limited discretion this Court enjoys to extend a policy for the States even as a constitutional remedy. Cf. Skinner v. Oklahoma, supra; Morey v. Doud, 354 U.S. 457 (1957); Dorchy v. Kansas, 264 U.S. 286 (1924).