CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Wallace v. Jaffree, 472 U.S. 38 (1985)

One of the well-established criteria for determining the constitutionality of a statute under the Establishment Clause is that the statute must have a secular legislative purpose. Lemon v. Kurtzman, 403 U. S. 602, 403 U. S. 612-613. The First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion. Pp. 472 U. S. 55-56.

Writing for a unanimous Court in Cantwell v. Connecticut, 310 U. S. 296, 303 (1940), Justice Roberts explained:

". . . We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. ***The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship.*** Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

Cantwell, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment. [Footnote 35] Enlarging on this theme, THE CHIEF JUSTICE recently wrote:

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"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both ***the right to speak freely and the right to refrain from speaking at all.*** See Board of Education v. Barnette, 319 U. S. 624, 319 U. S. 633-634 (1943);

id. at 319 U. S. 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. ***The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' Id. at 319 U. S. 637."***

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time, it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. [Footnote 36] **But when the underlying principle has been examined in the crucible of litigation, the**

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Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. [Footnote 37] This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, [Footnote 38]

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and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects -- or even intolerance among "religions" -- to encompass intolerance of the disbeliever and the uncertain. [Footnote 39]

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As Justice Jackson eloquently stated in West Virginia Board of Education v. Barnette, 319 U. S. 624, 319 U. S. 642 (1943):

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States, must respect that basic truth.

[Footnote 3/5]

THE CHIEF JUSTICE suggests that one consequence of the Court's emphasis on the difference between § 16-1-20.1 and its predecessor statute might be to render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God." Post at 472 U. S. 88. I disagree. ***In my view, the words "under God" in the Pledge, as codified at 36 U.S.C. § 172, serve as an acknowledgment of religion with "the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future." Lynch v. Donnelly, 465 U. S. 668, 465 U. S. 693 (1984) (concurring opinion).***