The Breakfast Club

Constitutional Minute for 24 January 2023

Right #1: No National Religion

"Mr. Madison said, he apprehended the meanings of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[i]

I could end this essay right here.

Having read Madison's words, do you have any doubt as to the intent of what's commonly known as the Establishment Clause of the First Amendment? Then why was there any doubt as to his intention in 1789? The answer: "wordsmithing."

Madison's initial draft had read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." (Emphasis added)

Seems clear to me. But those words then went to the Senate for consideration, and they came back reading: "Congress shall make no law respecting an establishment of religion..." What does that mean?

In 1947, after hearing oral arguments in *Everson v Board of Education,* if the Supreme Court had only walked next door and checked out the right book from the library,[ii] they would have saved themselves a lot of work. The *Everson* Justices clearly didn't do that. Instead, they went rummaging through a bunch of letters Thomas Jefferson wrote as President of the United States and came up with their own interpretation of the now-famous "wall of separation" metaphor Jefferson used in replying to the concerns of the Danbury (Connecticut) Baptists. The court has been inundated with Establishment Clause cases ever since.

In the 156 years between 1791 when the Bill of Rights was ratified and 1947 when *Everson* was decided, the Supreme Court heard only 16 cases/complaints concerning the interpretation of the Establishment Clause.[iii] Until 1947, the clause had only applied to actions of Congress. In *Everson* the Court took the opportunity to "incorporate" the clause into the Due Process Clause of the 14th Amendment and by doing so, make the states responsible for upholding this part of the Bill of Rights for the first time. Until then, the states had been free to view the subject of religion any way then wanted. Long before the Constitution and BOR came along, most states already had established state religions,[iv] some had even required in their new state constitutions that public servants be Protestant[v] or "acknowledge the Scriptures of the Old and New Testament to be given by divine inspiration."[vi] Some states (ex: New York) prohibited ministers from holding public office.

After Everson (and incorporation), the Court heard 132 cases over the next 75 years. Granted, most of these involved how the states were operating under the new interpretation of the Establishment Clause; oddly enough, Congress had still not tried to establish a national religion; imagine that!

Ironically, in the Everson case, which involved reimbursing parents for the cost of public bus fees to get their kids to Catholic school, the court found no Establishment Clause violation; however, slowly but

surely, the Court began to find what had become common practices across the nation had indeed crossed the line and was now "establishing" a religion.

Reading a daily bible verse to public school kids somehow established Christianity as the "national" religion.[vii] Reading to school kids a non-sectarian prayer each morning did so as well.[viii] That had to go. Hanging copies of the Ten Commandments on courthouse walls was a violation, even while a sculpture of Moses holding those same commandments over the Supreme Court building was not.[ix]

What actions have been challenged as violations but found by the Court to not be (beyond reimbursement of bus fees)? Some examples:

Religious schools may participate in a generally available tuition voucher program.[x]

States can provide computers to both religious and public schools.[xi] (note: this happened in Hampton in 2020 when COVID money became available)

States can provide reading teachers to low-performing students, even if they attend a religious school.[xii]

The Court soon realized that it needed help in sorting out what establishes a religion and what does not; in 1971 they created the famous (or infamous) "*Lemon Test*."

Found in the opinion *Lemon v. Kurtzman*, the test proposes the contested action be examined in light of three questions:

- Does the action have primarily a secular, or non-religious, purpose?
- Does the action advance or inhibit a religion?
- Does the action create an excessive "entanglement" with religion and the government?

In a 1997 decision,[xiii] the Supreme Court modified the *Lemon* test somewhat, now looking for whether "government indoctrination" is present. In 1989,[xiv] three Justices proposed adding a "Coercion Test" to the mix: Is the government coercing people to support or participate in religion against their will? Finding the previous tests still lacking, the Court added a Neutrality Test: Does the government action treat religious groups the same as other similarly situated non-religious groups? You saw this test in action in *Carson v Makin*, where tuition vouchers must be permitted to parents who want to send their children to Christian school where a public school system is not available (i.e., western Maine).

A glimmer of hope in the confused landscape of Establishment Clause cases appeared last summer. In *Kennedy v Bremerton School District*, Associate Justice Neil Gorsuch, writing for the 6-3 majority, pointed out that: "this Court long ago abandoned Lemon and its endorsement test offshoot…In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "'reference to historical practices and understandings.

"Historical practices and understandings?" *Paging Mr. Madison, Mr. James Madison. Message for Mr. Madison.*

Next week: Right #3: Religious Exercise.

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[i] From the Annals of Congress, 15 August 1789
[ii] The Library of Congress sits next door to the Supreme Court building.
[iii] Remember, the First Amendment begins with "*Congress* shall make no law…"
[iv] In 1787, all thirteen states had some form of state supported religion.
[v] Constitution of New Hampshire, 1784.
[vi] Constitution of Vermont, 1777.
[vii] *Engel v. Vitale,* 370 U.S. 421 (1962).
[viii] *Abington Township v. Schempp* (1963).
[ix] *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005).
[x] *Carson v. Makin*, 596 U.S. ___ (2022)
[xi] *Mitchell v. Helms,* 530 U.S. 793 (2000)
[xii] *Agostini v. Felton,* 521 U.S. 203 (1997).
[xiii] *Ibid.*
[xiv] *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).