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Religious Neutrality

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POSTSCRIPTS

Religious Neutrality

In the rash of comment which followed the Supreme Court's decision in *School Dist. of Abington Township v. Schempp,*[1] banning the reading and recitation of the Lord's Prayer, on June 17, 1963, another case, *Sherbert v. Verner,*[2] decided that day has been largely ignored. Since the two decisions were apparently written at the same time and are thus "part of the same transaction," the implications of the latter decision throw an important light on the developing concept of religious neutrality.

The appellant, a member of the Seventh-Day Adventist Church, had been discharged by her South Carolina employer because she would not work on Saturday, the Sabbath of her faith. Unable to obtain employment because she would not work on Saturday, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that a claimant is ineligible for benefits if he has failed, without good cause, to accept available suitable work when it is offered to him. On this ground the state commission denied her application.

The Supreme Court, speaking through Mr. Justice Brennan, reversed the judgment of the South Carolina Supreme Court and held that the state commission's action was an unconstitutional infringement of appellant's rights under the free exercise clause of the first amendment, made applicable to the states by the fourteenth amendment.

Mr. Justice Brennan declared that the disqualification for benefits burdened, at least indirectly, the free exercise of her religion. Not only did her ineligibility derive solely from the practice of her religion, but the ruling forced her to choose between following the precepts of her religion and forfeiting benefits, or abandoning one of the precepts of her religion in order to accept work. Government could not place a citizen in this dilemma. The same result was dictated by decisions in the larger context of other first amendment freedoms, which held that the bestowal of public benefits cannot be used to inhibit or deter the exercise of these freedoms.

The Court also found no compelling state interest of sufficient magnitude to justify the burden placed on her free exercise right.[3] The only one suggested had been the possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only

[1] 374 U.S. 203 (1963).
[2] 374 U.S. 398 (1963).
[3] *Id.* at 407.

dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. Even if this objection had been argued in the lower courts (which it had not), the Court doubted whether evidence supporting this contention would be sufficient to warrant a substantial infringement of religious liberties.[4]

The Court ruled out possible objections that its decision "established" the Seventh-Day Adventist Religion. Rather, governmental neutrality toward religion demanded this decision, in reaffirmation of the principle set down in *Everson v. Board of Educ.*[5] that no state may exclude believers or nonbelievers, *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."[6]

Mr. Justice Douglas, in a concurring opinion, reasoned that no state interest, however secular in purpose, could justify governmental interference with an individual's religious scruples.[7] This does not mean, however, that an individual can demand from the government financial support to exercise his religious beliefs.

While concurring in the result, Mr. Justice Stewart attempted to prove that the majority had contradicted itself and had not succeeded in "papering over" the "double-barreled dilemma" presented by the case. To uphold the appellant's claim, he argued, was to prefer a religious over a secular ground for being unavailable for work, and therefore to establish a religion, according to the "mechanistic" establishment theory proposed by the majority in previous cases.[8] His solution to the dilemma was to drop the strict neutrality principle and adopt a more flexible theory.

Mr. Justice Harlan and Mr. Justice White dissented on the ground that a state should not be compelled constitutionally to carve out an exception, based on a claimant's religious convictions, to its general rule of eligibility.[9] They saw, however, sufficient flexibility in the norm of religious neutrality to permit a state legislature to accommodate the unemployment compensation law to the exercise of religious belief, if it should so choose.

The holding of the *Sherbert* case – that a state public welfare program must not exclude persons who are unable to meet requirements to share in such benefits because of their religious beliefs, where no compelling state interest justifies this exclusion–raises questions about the consistency of the case with *Braunfeld v. Brown.*[10] The majority opinion saw no such problem. It found in *Braunfeld* a strong state interest in providing a uniform day of rest for all workers, attainable only by declaring Sunday a day of rest. This justified a state in denying an exemption to Sabbatarians from Sunday closing laws. No such interest was found in *Sherbert.*[11]

Mr. Justice Stewart would overrule *Braunfeld* as wrongly decided because of the criminal statute operating in that case. Mr. Justice Harlan and Mr. Justice White considered that the majority, in spite of its disclaimer, had necessarily overruled *Braunfeld.* In their view, not only were the state interests in both cases equally important, but the economic burden on the individual

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[4] *Ibid.*
[5] 330 U.S. 1 (1947).
[6] *Id.* at 16.
[7] Sherbert v. Verner, 374 U.S. 398, 410 (1963) (concurring opinion).
[8] *Id.* at 415 (concurring opinion).
[9] *Id.* at 423 (dissenting opinion).
[10] 366 U.S. 599 (1961).
[11] Sherbert v. Verner, *supra* note 7, at 408-09.

resulting from denial of the benefits was lighter in *Sherbert*. In their balancing of the interests, the scale tipped toward the state.

It is difficult to see how, in the future, the unemployment commission and the South Carolina courts can avoid an inquiry into the sincerity of the religious beliefs of a claimant seeking benefits but unwilling to work one day a week because of his beliefs. Mr. Justice Brennan's majority opinion expressly refused to pass judgment on this issue, although he stated that the state would have to demonstrate that no alternative forms of regulation would combat spurious claims without infringing first amendment rights. The dissent believed that an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions. Perhaps the problem is no different from that presented by exemptions based on religious belief in earlier cases decided by the Court when the "preferred freedoms" doctrine was first promulgated.[12]

Another important aspect of the *Sherbert* decision is its bearing on the aid to education issue. The holding seems logically to demand that in general programs of state and federal aid to students there be no exclusions of individuals because of their religious beliefs. The usual way in which a student expresses his religious beliefs in the field of education is by attending a church-related school. Thus, no student can be denied tuition grants or tax benefits because he attends an accredited church-related school, provided no substantial state interest justifies his exclusion. It is difficult to imagine the nature of such an interest; if anything, the dominant interest of the state lies in the opposite direction, namely, that of furthering the education of all citizens.

State programs of fringe benefits to students (*e.g.*, textbooks, lunches, bus transportation), which exclude children attending church-related schools, do not appear to be affected by the *Sherbert* rationale. Such exclusion is usually based on a public-private school classification, which lacks religious overtones. But where the exclusion applies only to children attending church-related schools, it might well be argued that the classification is unconstitutional. It should be noted, however, that it is an open question whether the *Sherbert* rationale can be extended to include direct aid to institutions as well as individuals.

The concept of religious neutrality emerges from the *Schempp* and *Sherbet* decisions as a two-edged sword. While *Schempp* banned governmental support of religious exercises in the public school, the *Sherbert* holding reinforced the principle that our "institutions by solemn constitutional injunction may not officially involve religion in such a way as to . . . discriminate against, or oppress, a particular sect or religion."[13]

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[12] See Regan, *Freedom of the Mind and Justice Brennan*, 9 CATHOLIC LAW. 269, 285 (1963).

[13] School Dist. of Abington Township v. Schempp, *supra* note 1, at 231 (concurring opinion).

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