The Catholic Lawyer

Volume 28
Number 2 *Volume 28, Spring 1983, Number 2*

Article 15

September 2017

Constitutionality of Legislation Denying Tax Exempt Status to Racially Discriminatory Schools

Eileen M. Hanrahan, Esq.

CONSTITUTIONALITY OF LEGISLATION DENYING TAX-EXEMPT STATUS TO RACIALLY DISCRIMINATORY SCHOOLS

EILEEN M. HANRAHAN, ESQUIRE

Two of the arguments asserted against the proposed legislation to amend section 501(c)(3) of the Internal Revenue Code are that the legislation violates the establishment and free exercise clauses of the Constitution.

The Establishment Clause

In *Lemon v. Kurtzman*,[1] the Court established a three-part test to determine whether legislation violates the establishment clause: (1) a statute must have a "secular legislative purpose"; (2) it must have a primary effect "that neither advances nor inhibits religion"; and, (3) it must not foster "excessive government entanglement with religion."[2]

The proposed legislation has a valid secular purpose in that it seeks to eliminate racial discrimination and to terminate governmental aid to institutions that racially discriminate. Thus, the proposal apparently is valid under the first part of the *Lemon* test.

It is argued that the proposed legislation is invalid under the second part of the *Lemon* test—that a statute must have a primary effect that neither advances nor inhibits religion—because it penalizes religions whose practices include racial discrimination, and preferentially treats religions whose practices do not include racial discrimination. An examination of various establishment clause cases reveals that the following fac-

---

[1] 403 U.S. 602 (1971).

[2] *Id.* at 612-13.

tors have been important in determining whether a statute is unconstitutional under the second part of the *Lemon* test: (1) whether the statute provided for aid to a generalized class of recipients or primarily to recipients of a sectarian nature; (2) whether the statute provided for aid to the secular or sectarian mission of the school; and, (3) whether the statute provided for benefits that were direct, or only indirect and incidental.[3]

In examining the first of these factors, it would appear that the statute neither aids nor hinders a class consisting of primarily sectarian institutions. The legislation addresses the entire class of 501(c)(3) organizations. Regulations promulgated pursuant to the legislation would affect all 501(c)(3) organizations that maintain schools. The burden of exclusion from tax-exempt status falls equally upon all organizations, religious and nonreligious, whose schools have racially discriminatory policies, regardless of the nature of the beliefs on which such policies are grounded. The primary effect is to burden a broad class of organizations, only some of which are religious.

Second, it is questionable whether the proposed legislation benefits or inhibits the sectarian, as contrasted with the secular, nature of the religious school. The Supreme Court has already upheld as nonviolative of the establishment clause, a property tax exemption for houses of worship[4] and state payment of bus fares of children to and from religious schools.[5] In so holding, the Supreme Court conceded that religious schools would be benefited by the statutes at issue, but perceived the benefits as not intimately tied to the sectarian nature of the religious school.[6] The Supreme Court has also approved, in dictum, statutes providing police and fire protection, school lunches, health facilities, crossing guards, and highways to religious institutions, as statutes of general applicability enacted for a secular purpose.[7]

The proposed legislation is similarly a statute of general applicability. It will burden, through the denial of the tax exemption, both the sectarian and secular aspects of the religious institution. However, in much the same way that generalized advancement of a religious institution, in common with other institutions, did not establish a primary effect to advance religion, it would seem that a generalized inhibition of religious in-

---

[3] *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366-72 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780-89 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480-81 (1973); Tilton v. Richardson, 403 U.S. 672, 687-88 (1971); Everson v. Board of Educ., 330 U.S. 1, 15-18 (1947).

[4] Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970).

[5] Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947).

[6] 397 U.S. at 675; 330 U.S. at 18.

[7] *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736, 746-47 (1976); Walz v. Tax Comm'n, 397 U.S. 664, 671-72 (1970); Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947).

stitutions, in common with others, would not establish a primary effect to inhibit religion.

It is argued that rather than simply benefiting or inhibiting *all* religions, this legislation, unlike legislation that the Court has approved, selectively benefits *some* religions and disadvantages others. It is argued that such different treatment is preferential treatment of some religions. The short answer to this argument is that a statute of general applicability, secular in purpose, does not violate the establishment clause simply because it encourages or discourages, requires or prohibits activity in accordance with the tenets of some religions and contrary to the tenets of others.[8]

In *McGowan v. Maryland,*[9] the Court upheld Sunday closing laws, as applied to Jewish merchants.[10] In *Gillette v. United States,*[11] the Court upheld a conscientious objector status for persons who for religious reasons conscientiously opposed all wars, but denied such status to those who for religious reasons opposed only some wars.[12] Finally, the Court, in *Harris v. McRae,*[13] held that merely because abortion regulation coincides with the tenets of the Roman Catholic religion does not mean that the establishment clause has been violated.[14]

In all these cases, the different treatment of religion that resulted from a neutrally applied secular statute was not the preferential treatment of religion, but rather a disparate impact upon religion. The same is true of the proposed legislation. It does not unconstitutionally distinguish between religious organizations as such; it distinguishes between discriminatory and nondiscriminatory organizations. Thus, the Court would probably find that the primary effect of the statute is neither to advance nor to inhibit religion.

Finally, the Court has identified a third test that a statute must pass to be found consistent with the establishment clause: the statute must not foster excessive government entanglement with religion. The Court, in *Lemon,* cited what it termed the "classic warning" of "certain programs, whose very nature, is apt to entangle the state in details and administration and planning."[15] The test is one of degree.[16] The Court has

---

[8] Harris v. McRae, 448 U.S. 297, 319-20 (1980); Gillette v. United States, 401 U.S. 437, 448 (1971); McGowan v. Maryland, 366 U.S. 420, 442 (1961).

[9] 366 U.S. 420 (1961).

[10] *Id.* at 427-28.

[11] 401 U.S. 437 (1971).

[12] *Id.* at 448-55.

[13] 448 U.S. 297 (1980).

[14] *Id.* at 319-20.

[15] 403 U.S. at 615 (citing Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (Harlan, J., concurring)).

[16] 397 U.S. at 674.

found excessive government entanglement where the grant of government aid to a religious school necessitated government monitoring and inquiry to ensure that the government aid was confined to a secular use by the school.[17] The Court consistently either has failed to find or has not inquired into excessive entanglement when the aid provided by the government was itself secular in nature and would not require any government surveillance, monitoring or auditing to ensure secular use.[18]

Some contend that the legislation would invite excessive government involvement with religious schools. The Court could reasonably conclude, however, that the proposed legislation permits the drafting of regulations limiting government involvement to constitutionally permissible levels and does not, on its face, inevitably call for the kind of government supervision and inspection found to have constituted excessive involvement in the past.

In conclusion, while it seems clear that the proposed legislation does have a secular purpose, predicting results under the second and third prongs of the *Lemon* test is more difficult.

The Free Exercise Clause

The question with respect to the free exercise clause concerns whether the denial of a tax exemption on account of religiously based, racially discriminatory policies violates the right to free exercise of religion of the discriminatory private school. The case law in this area has established that courts must consider the following three questions: (1) Is the right to free exercise of religion at stake?; (2) If so, does the legislation burden that right?; (3) If so, is the burden nevertheless justified by a compelling governmental interest that cannot be advanced by less restrictive means?[19]

Although the Court will not examine the reasonableness or validity of a religious belief, the school at the outset must, of course, demonstrate that its racially discriminatory policies are religiously based in order to present the free exercise claim.[20] The Court then must determine whether a burden on the right of free exercise exists. The Court has found direct burdens on the free exercise of religion where a person was compelled to

---

[17] New York v. Cathedral Academy, 434 U.S. 125, 128-30 (1977); Wolman v. Walter, 433 U.S. 229, 254-55 (1977); Meek v. Pittenger, 421 U.S. 349, 369-72 (1975); Lemon v. Kurtzman, 403 U.S. 602, 617-19 (1971).

[18] *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654 (1980); Wolman v. Walter, 433 U.S. 229, 240-41 (1977); Tilton v. Richardson, 403 U.S. 672, 687 (1971).

[19] Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981); Wisconsin v. Yoder, 406 U.S. 205, 213-15 (1972); Sherbert v. Verner, 374 U.S. 398, 403-09 (1963).

[20] *See* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).

act in violation of his religious beliefs or prohibited from acting in accordance with his religious beliefs. Direct burdens on religion existed where the Amish were compelled to pay social security taxes[21] and to send their children through formal schooling beyond the eighth grade,[22] where Mormons were prohibited from practicing polygamy,[23] and where children who were Jehovah's Witnesses were prohibited from distributing religious literature on the street.[24]

In *Braunfeld v. Brown*,[25] the Court described an "indirect" burden on free exercise as "legislation which does not make unlawful the religious practice itself."[26] The Court stated that statutes imposing an indirect economic burden on religion were "nearly limitless."[27] The Court has found economic burdens on free exercise of religion where a person was forced to choose between following the precepts of religion and forfeiting benefits or abandoning one of the precepts of religion to receive economic benefits.[28] In *Braunfeld*, the burden consisted of the economic disadvantage suffered by Jewish merchants as a result of Sunday closing laws.[29] The Court has also found economic burdens where persons who refused to work for religious reasons were denied unemployment compensation.[30]

The Court plainly has rejected the argument that because a tax benefit is a right or privilege, a party cannot complain that there is burden when it is denied a benefit to which it had no right in the first place. The Court stated: "It is too late in the day to doubt that the liberty of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[31] It would seem then that the denial of the tax exemption would be a burden on the right of free exercise of religion because the economic benefit is conditioned upon the forfeiture of a religious practice. The degree of burden can be determined only on a case by case basis.

Once a burden on free exercise is established, the Court must examine the government interest at stake to determine if the burden on religion is justified by a compelling governmental interest that cannot be

---

[21] United States v. Lee, 455 U.S. 252 (1982).
[22] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
[23] Reynolds v. United States, 98 U.S. 145, 166-67 (1878).
[24] Prince v. Massachusetts, 321 U.S. 158, 170-71 (1944).
[25] 366 U.S. 599 (1961).
[26] *Id.* at 606.
[27] *Id.*
[28] *See* Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Braunfeld v. Brown, 366 U.S. 599, 607 (1961).
[29] 366 U.S. at 601.
[30] Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981); Sherbert v. Verner, 374 U.S. 398, 404 (1963).
[31] Sherbert v. Verner, 374 U.S. 398, 404 (1963).

advanced by less restrictive means.[32] The government interests in denying tax-exempt status to racially discriminatory schools are to eliminate racial discrimination and any indirect government benefits to, or association with, racially discriminatory practices. These interests traditionally have been regarded as of the highest order.[33]

Although the Supreme Court has never considered the question whether a burden on free exercise of religion is outweighed by the government interest concerning racial discrimination, free exercise cases previously before the Court are instructive. In *Reynolds v. United States*,[34] the Court upheld the prohibition of polygamy as applied to Mormons, citing longstanding national policy.[35] The Court, in *Prince v. Massachusetts*,[36] upheld the prohibition of distribution of religious literature by children who were Jehovah's Witnesses, citing the state's great interest as parens patriae.[37] In *Braunfeld*,[38] the Court upheld Sunday closing laws as applied to Jewish merchants, citing the state's important interest in a uniform day of rest.[39] Finally, in *United States v. Lee*,[40] the Court upheld mandatory contribution to the Social Security system by the Amish, citing a high interest in the effective functioning of the tax system.[41] Thus, the Court has upheld both direct and indirect burdens on religion, citing compelling state interests.

In other cases, the Court has struck down statutes that burdened religion because either the state interest was not compelling or because the burdensome statute was unnecessary to achieve the state interest. Thus, in *Wisconsin v. Yoder*,[42] the Court struck down a statute compelling schooling beyond the eighth grade as applied to the Amish, stating that the contribution of the statute to the state's interest in preparing children for the duties of citizenship was speculative and that the Amish, in any event, educated their children themselves and had already demonstrated their good citizenship.[43] In *Sherbert v. Verner*[44] and *Thomas v. Review*

---

[32] *See supra* note 19 and accompanying text.

[33] *See* Letter from President Ronald Reagan to the Honorable Thomas P. O'Neill, Jr. (January 18, 1982); *see also* Runyon v. McCrary, 427 U.S. 160, 176 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420-22 (1968); Loving v. Virginia, 388 U.S. 1, 11 (1967); Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954); Shelley v. Kramer, 334 U.S. 1, 20-21 (1948); U.S. CONST. amend. XIII, XIV, XV; 42 U.S.C. §§ 1981-1995, 2000a to 2000e-6 (1976).

[34] 98 U.S. 145 (1878).

[35] *Id.* at 166.

[36] 321 U.S. 158 (1944).

[37] *Id.* at 166.

[38] 366 U.S. 599 (1961).

[39] *Id.* at 607.

[40] 455 U.S. 252 (1982).

[41] *Id.* at 258-59.

[42] 406 U.S. 205 (1972).

[43] *Id.* at 234-36.

Board,[45] the Court struck down the denial of unemployment compensation to persons who refused employment on religious grounds, finding the state interest in either case to be unsupported by the evidence.[46]

The principle to be gleaned from an overall analysis of these cases is that a burden on the free exercise of religion will be upheld when the state advances a compelling interest that cannot be advanced by less restrictive means. The Court has upheld even direct burdens on religion so long as the state advanced a compelling interest. Here, the government interest in eliminating discrimination and indirect government benefits to discrimination is compelling. The proposed legislation is probably a necessary means to realize that interest.

In those cases where the Court has struck down the state statutes, not only was the state interest found to be either insubstantial or not compelling, but the burden on religion was severe. It is questionable whether the burden of the denial of a tax exemption on the school with religiously based, racially discriminatory policies rises to the level of burden found in cases where the Court has sustained the free religious belief as in *Yoder*, and the denial of unemployment compensation to a private individual as in *Sherbert* and *Thomas*.

Balancing competing interests is a precarious and difficult task. The Court, however, reasonably could conclude that neither of the elements found in cases where the free exercise right has been upheld exists here, and on that basis sustain the legislation.

Finally, it should be noted that arguments of unconstitutionality of the proposed legislation have been raised on the basis of the right of freedom of association[47] and the right of parents to raise and educate children.[48] Such arguments are significantly less formidable than arguments based on religious rights, and probably would not support a finding of unconstitutionality.[49]

---

[44] 374 U.S. 398 (1963).

[45] 450 U.S. 707 (1981).

[46] 450 U.S. at 720; 374 U.S. at 403-04.

[47] *See* NAACP v. Alabama, 377 U.S. 288, 300-09 (1964).

[48] *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[49] *See* Runyon v. McCrary, 427 U.S. 160, 175-76 (1976); Norwood v. Harrison, 413 U.S. 455, 470 (1973).