Brennan and Religion

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Justice William J. Brennan, Jr. cared deeply about religion in America. He was not a secularist who cavalierly dismissed religion or who viewed it with barely-concealed contempt. Brennan's respect for the intensity of American religious life convinced him that religion raised enormous constitutional complexities that had to be addressed with caution and delicacy.

Questions of religion were easiest for Brennan when formulated in terms of the rights of individuals freely to exercise their religious convictions. Rights to religious freedom were in this dimension like all fundamental individual rights; they were to be accorded the utmost respect. Even today, Brennan's opinion in *Sherbert v. Verner*[1] remains a canonical decision for those who believe that Free Exercise rights should receive the highest degree of constitutional protection. Brennan maintained his commitment to the rights established by the Free Exercise Clause throughout his career, as is well evidenced by his late dissent in *Goldman v. Weinberger*.[2]

Brennan interpreted the Establishment Clause primarily in light of his focus on the Free Exercise Clause. He was determined that government involvement in religion not undermine religion itself,[3] and he was for this reason committed to enforcing the entanglement prong of the *Lemon* test.[4] He explained that "When the state becomes enmeshed within a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers . . . . In addition, the freedom of even the adherents of the denomination is limited by the government intrusion into sacred matters."[5] As he said early on in 1963, in his magnificent

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1. 374 U.S. 398 (1963).

2. 475 U.S. 503, 513 (1986).

3. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring).

4. 403 U.S. 602 (1971).

5. Aguilar v. Felton, 473 U.S. 402, 409-10 (1985). Brennan continued: "'[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.'" *Aguilar* at 410

concurring opinion in *School District of Abington v. Schempp*, "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."[6]

Brennan's summary of the four purposes of the Establishment Clause in *Marsh v. Chambers*[7] demonstrates how deeply his interpretation of the Clause flowed from his allegiance to maintaining the integrity of religious practices. The Establishment Clause, Brennan argued, guarantees "the individual right to conscience" because it ensures that persons are not coerced to support, through taxes or otherwise, religious practices with which they disagree;[8] it prevents "the state from interfering in the essential autonomy of religious life";[9] it guards against "the trivialization and degradation of religion by too close an attachment to the organs of government";[10] and it seeks to "assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena."[11]

In *McDaniel v. Paty* Brennan even authored a concurring opinion asserting that the Establishment Clause would itself prohibit a Tennessee statute that barred clergy from serving as delegates to a Tennessee constitutional convention.[12] The case would seem most naturally to turn on the Free Exercise Clause, on the notion that the government could not prevent "sectarian bickering and strife . . . by"[13] suppressing religious speech or by interfering "with efforts to proselyte or worship in public places."[14] But Brennan nevertheless stretched to argue that "the Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here."[15]

Underlying Brennan's support for a strong Establishment Clause lay his conviction that the very intensity of American religious belief required strict state neutrality. "[J]ust as religion throughout history has provided spiritual comfort, guidance, and inspiration to many," he wrote, "it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem . . . is jealously to guard the right of

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(quoting McCollum v. Board of Education, 333 U.S. 203, 212 (1948)). *See* Hunt v. McNair, 413 U.S. 734, 752-53 (1973) (Brennan, J., dissenting).

6. 374 U.S. 203, 259 (1963).
7. 463 U.S. 783 (1983).
8. *Id.* at 803.
9. *Id.*
10. *Id.* at 804.
11. *Id.* at 805.
12. 435 U.S. 618 (1978).
13. *Id.* at 641.
14. *Id.* at 640.
15. *Id.* at 641.

every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion."[16]

For Brennan, in short, the Establishment Clause served ends that were closely allied to those of the Free Exercise Clause, which was to protect "the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time" protecting "religious beliefs" from the "corrosive secularism" that would result from the entanglement of the government.[17] Brennan believed that the Establishment Clause expressed the constitutional judgment that "in our society, religion must be a private matter for the individual, the family, and the institutions of private choice."[18] This judgment allowed Brennan simultaneously to affirm Free Exercise rights, which he deemed individual and private, and strongly to support Establishment Clause limitations on government entanglement with religion.

The boundary between the private and public dimensions of religion was for Brennan a matter of historical and sociological contingency. As he said in *Schempp*, the boundary did not inhere in any ontologically immutable distinction between public action and private belief, but emerged instead out of the needs of a heterogeneous and conflicted nation:

> [O]ur religious composition makes us a vastly more diverse people than were our forefathers. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.[19]

At first the Establishment Clause required neutrality chiefly among the many different Protestant sects contending for predominance in the early republic. The Clause allowed government participation in Christian observance so long as the government remained "nonsectarian" when measured by disputes among these sects. But as the nation grew into a battleground between Protestants and Catholics, and then between Christians and Jews, and finally

16. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985). *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 644 (1989) (Brennan, J., concurring in part and dissenting in part).

17. *Ball*, 473 U.S. at 385.

> As Justice Frankfurter . . . observed, the Establishment Clause "[withdraws] from the sphere of legitimate legislative concern and competence a specific, but comprehensive area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief." That the Constitution sets this realm of thought and feeling apart from the pressures and antagonisms of government is one of its supreme achievements.

Lynch v. Donnelly, 465 U.S. 668, 726 (1984) (Brennan, J., dissenting).

18. *Marsh*, 463 U.S. at 802 (quoting *Lemon v. Kurtzman*, 403 U.S. at 625) (internal quotation marks omitted).

19. 374 U.S. at 240-41.

between the religious and the non-religious, Brennan believed that the neutrality required by the Establishment Clause would have to evolve as well, although he always maintained that under the Establishment Clause the state could "recognize the religious beliefs and practices of the American people as an aspect of our history and culture."[20]

The decisive question for Brennan was whether challenged state action affects a "symbolic union of church and state" that would likely "be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[21] Constitutionally mandated "sensitivity to the symbolic impact of the union of church and state"[22] required close attention to social context. That is why Brennan so strongly objected to interpretations of the Establishment Clause which he regarded as "static and lifeless,"[23] fixing the Clause's meaning "by the life experience of the Framers."[24] Brennan's view is usually taken to reject what is now called "originalism." But on this interpretation they can instead be understood as an effort to apply the original purposes of the Clause to the changing historical circumstances of the nation.

20. *Marsh*, 463 U.S. at 811.
21. *Ball*, 473 U.S. at 390.
22. *Id.*
23. *Marsh*, 463 U.S. at 817.
24. *Id.* at 816.