CIVIL LIBERTY AND CIVIL RIGHTS

Sixth Edition

by Edwin S. Newman

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by EDWIN S. NEWMAN

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INTRODUCTION

Civil Liberties and Civil Rights

Definition and Distinction

When our founding fathers made us one nation, they had this fear--that a strong central government might overrun the rights of the people. To prevent this, they drew up a list of prohibitions on the powers of the federal government. No religion was to be established; the people were to enjoy freedom of speech, press assembly and religious worship; a man's life, liberty, and property were to be protected against arbitrary action by the government. These prohibitions, securing freedom of expression and the protection of personal liberty, were set down in the Bill of Rights, the first ten amendments to the Constitution.

Initially, these prohibitions were directed only against the federal government. The respective states, however, in their own constitutions, adopted similar prohibitions protecting the liberty of the people against arbitrary action by state government. Then, after the Civil War, the Fourteenth Amendment to the Constitution was passed. Under this amendment, no state could deprive any person of life, liberty or property without due process of law. Gradually, this "due process" clause of the Fourteenth Amendment came to include most of the prohibitions of the Bill of Rights, so that the Constitution became complete protection for the people against the action of both state and federal government. These rights, protected by the Bill of Rights and by the Fourteenth Amendment, are known as our "civil liberties."

Specifically, they include the requirement that Church and State be separated; the freedom of speech, press, assembly and religion; protection against double jeopardy; the right not to be

a witness against one's self; protection against unreasonable searches and seizures and against excessive fines and punishments; the right to counsel in criminal cases; and the right to trial by jury. Of course, the exercise of these rights is not absolute; nor is the extent of protection always the same regardless of whether a state or the federal government is involved.

It is one thing, however, to protect the people against the government; it is quite another to protect them against themselves. While the founding fathers dealt wisely with the possibility of tyranny by government, it was only through trial and error experience that we came gradually to deal with the problem of the tyranny of the majority.

Under the Constitution, the government should not act to quiet an unpopular viewpoint; but there was little to stand in the way of a mob riding a man out of town because he spoke his mind. Under the Constitution, the government could not act to establish any one religion; yet, there are pages of our history which tell of unpunished burnings of churches, libel and slander against members of minority religious groups and incitement to violence against them. Under the Constitution, the government could not reduce any American to second-class citizenship because of the color of his skin or his racial origin; intolerance, however, created discrimination against colored persons, and in some instances, the outright threat to their lives, liberty and property.

Over the past hundred years, this problem of the protection of the people from one another has come to be dealt with in an increasingly effective and successful way--through a combination of amendments to the federal Constitution, through state and federal legislation, and perhaps, most significantly, through the courts, and in particular, the United States Supreme Court. The rights thus created, designed to protect the equal standing of the individual before his government, but primarily to protect the freedom of the individual against attacks by other persons, are known as our "civil rights."

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Chapter I
FIRST AMENDMENT RIGHTS

Religious Freedom

This nation was founded by people who had fled from the religious persecutions and intolerance of seventeenth and eighteenth century Europe. They sought and found on these shores the opportunity to worship according to the dictates of their conscience. But many of these people refused to extend to others the freedoms they found for themselves. Religious toleration did not prevail in the colonies which they had established. In fact, they excluded from their colonies persons of other religious beliefs or severely punished dissenters from the religion of the majority. This policy proved impractical and by the time of the American Revolutionary War the colonies had relaxed most of their restraints on worship and permitted members of all faiths to pursue their own religious beliefs and practices. By the time the Constitution was drawn up, our leading statesmen had become tolerant.

One cannot argue, however, that those who wrote our Constitution were hostile to religion, or that they believed that there should be no relationship whatsoever between the federal government and the churches. Nevertheless, whatever the individual feelings might have been among the writers of that document, they clearly agreed that the functions of government and religion should be completely separate. Religion and government as institutions would be best served, they felt, if neither tried to exert its influence over the policies of the other.

The First Amendment is the foundation stone of religious liberty in the United States. This Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Essentially, this means that (1) Congress -- and under the Fourteenth Amendment, the legislatures of the states -- must not assist or finance one "official" religion, since that would be an "establishment"

specifically prohibited by the First Amendment, and (2) that there must be no legal requirements or penalties governing what a person should believe, or the manner in which a person should worship.

It is the First Amendment which is the basis for all areas of religious freedom. However, it should be noted that there exists in the body of the Constitution an important provision dealing directly with a crucial religious right, the forbidding of religious tests as qualifications for public office.

Another important point about the "religion clause" is that it is confined the inherent prohibitions against governmental action to the federal government. At the time of the adoption of the Constitution of the United States many of the original thirteen states had specific religious establishments or other restrictive provisos. Indeed, in these earliest days of the Republic, only Virginia and Rhode Island had conceded full, unqualified freedom. By 1833, however, following the capitulation of the Congregationalists in Massachusetts, the fundamental concepts of freedom of religion had, to all intents and purposes, become a recognized fact and facet of public law, with only minor aberrations, throughout the young nation.

One of the problems in the interpretation of the religion clause is that its language speaks both of the "establishment" of religion and the "free exercise" of religion. It was not until the New Jersey Bus case (1947) that the Court held that the First Amendment's prohibition against legislation respecting an establishment of religion is also applicable to the several states by virtue of the language and obligations of the Fourteenth Amendment. Thus not until 1947 had both aspects of the religion guarantee been judicially interpreted to apply to both the federal government and the states.

The classic definition of "religion" was given by the Supreme Court in 1890 when the Court unanimously upheld a lower court judgment that one Samuel Davis, a Mormon residing in the then Territory of Idaho, should be disqualified as voter for falsifying his voter's oath "abjuring bigamy or polygamy as a condition to vote" since, as a Mormon, he believed in polygamy. Polygamy, then as now a criminal offense, constituted a disqualification under territorial voting and other statutes. Mr. Justice Stephen Field wrote for the Court:

> The term "religion has reference to one's view of his relations to his creator, and to the obligations they impose of reverence for his being and character,

> and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter. . . . With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people are not interfered with. . . .

Thus, although giving religion the widest feasible interpretation in terms of individual commitment, Field found that Davis had violated the reservation of the last qualifying clause.

As the years passed, this Supreme Court definition of religion was most often tested in cases dealing with military exemptions and conscientious objectors. Exemption from the draft and/or combat service for those who oppose war on religious grounds is deeply rooted in American tradition and history -- although it was not really institutionalized until post-Civil War years. Much litigation has attended this problem, frequently involving the Jehovah's Witnesses, who contend that every believing Witness is a "minister" and as such ought to be exempt from military service. Both the Quakers (Society of Friends) and the Mennonites have made pacifism a dogma. And of course there has been a perpetual stream of individual conscientious objectors coming from small Protestant sects as well as from other faiths. The Vietnam War was a period of large numbers of objectors. Congress has always recognized bona fide conscientious objectors and exempting them from military service. But it is not clear that there exists a constitutional rather than a moral obligation to exempt conscientious objectors.

The Vietnam War raised the question of whether an individual may qualify as a conscientious objector because his or her belief dictates against participation in a particular war but not against participation in all wars. In 1971 the Supreme Court heard the arguments of two such objectors, one whose belief was "based on a humanist approach to religion," and the other, a devout Catholic, who believed it his duty according to his religion "to discriminate between 'just' and 'unjust' wars, and to foreswear participation in the latter." The petitioners based their argument on two grounds: first, that exemption of only those individuals whose belief dictates against participation in all wars acts as an establishment of religion in that it excludes

those religions which require the individual to differentiate between just and unjust war; and second, that the exemption interferes with the free exercise of religion of those who wish to make that differentiation. The Court rejected both arguments, holding that here the government's interest in fairly determining who is required to serve in the armed forces outweighs the claims of individual conscience. The problems of determining what might constitute legitimate objection to a particular war are so great, declared the Court, as to be incapable of fair determination. Such objection might be largely political in nature, or it might be subject to change and nullification during the course of a particular war. Finally, the recognition of selective rather than general conscientious objection might well "open the doors to a general theory of selective disobedience to law." and could well pose a serious threat to the morale and resolve of one whose objection to a particular war might be equally strong as that of the conscientious objector but who based that objection on political or moral rather than religious grounds." It does not bespeak an establishing of religion for Congress to forego the enterprise of distinguishing those whose dissent has some conscientious bases from those who simply dissent," concluded the Court.

Before leaving the religious clause of the First Amendment, a discussion of the subject of its prohibitions in relationship to public education.

Few judicial decisions have produced more violent controversy than the Supreme Court's ruling in the Regents' Prayer case (Engel v. Vitale).

On June 25, 1962, the Court held 6-1 that the 22-word prayer adopted by the New York State Board of Regents in 1951 was "wholly inconsistent with the Establishment Clause" of the First Amendment. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country."

Writing for the majority, Justice Hugo L. Black said:

" . . . The First Amendment was added to the Constitution . . . as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say . . . .

It is no part of the business of government to compose official prayers for any group . . . to recite as part of a religious program carried on by the government . . . . Neither the fact that the prayer may be denominationally neutral, nor . . . that its observance . . . is voluntary can serve to free it from the limitations of the Establishment Clause . . . . It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

The Engel case dealt with a prayer, however innocuous, prepared and sponsored by governmental authority. One year later, however, on June 17, 1963, the Supreme Court rendered an even more far-reaching decision. The Court held, 8-1, that Pennsylvania's Bible-reading statute and Baltimore's rule requiring the recitation of the Lord's Prayer or the reading of the Bible at the opening of the public school day were unconstitutional under the Establishment Clause of the First Amendment. In neither case was attendance at the school exercises compulsory. Justice Clark concluded for the majority as follows:

"The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel . . . In the relationship between man and religion, the state is firmly committed to a position of neutrality."

So divided has been the reaction of the public, the leaders of the faiths and opinion moulders that constitutional amendments have been introduced, designed to overturn the Supreme Court decision. The first of these was the Becker Amendment in 1963, the text of which follows:

> Section 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution or place.

Section 2. Nothing in this Constitution shall be deemed to prohibit making reference to, belief in, reliance upon, or invoking the aid of, God or a Supreme Being, in any governmental or public institution or place or upon any coinage, currency, or obligation of the United States. Section 3. Nothing in this article shall constitute an establishment of religion.

Thus far, there has been no marked progress toward moving this Amendment through Congress.

The second amendment proposed was that of Senator Dirksen of Illinois (in 1966) which would authorize the providing for or permitting of "voluntary participation" in prayer but would prohibit school authorities from prescribing the "form or content" of the prayer. There has been no appreciable movement on this amendment either.

Released Time

Within four decades, all but two of the fifty states have put "released time" programs into operation. Under these programs, children are excused from school, with the consent of their parents in order to receive religious instruction. It is estimated that some 27 million public school children in about 3,000 communities are presently enrolled in these programs.

In 1948, the Supreme Court held (McCullum v. Board of Education) that such classes may not constitutionally be held on school premises. But in 1952, when confronted with the actual situation of released time classes conducted off school premises and without pressure on youngsters to participate, the Court held such practices valid under the First Amendment (Zorach v. Clauson).

The related problem of the use of school premises by religious groups at one point or another have been beneficiaries of communal sentiment in favor of opening the school doors to pressed parishes and congregations or where emergencies are involved. While issues are formulated in the legal and constitutional arena, the public generally and frequently crosses the "wall of separation."

Religious Holiday Observances

Severe community tensions have been engendered where the issue of Christmas observance in the schools has been raised. Generally, where such observances have been traditional in preponderantly Christian communities, the objection of newer Jewish residents has touched off conflict. Thus far, however, there has been no articulate attempt to have the matter resolved legally.

The spectrum of opinion ranges from those who would perpetuate the established tradition, including the celebration of the Nativity itself. Others favor the screening of such observances to eliminate purely doctrinal aspects, including the Nativity. Still others suggest the introduction of Hanukah observance as a type of balance to the Christmas observance. At the far end of the spectrum are those who feel that religious holiday observances of any faith are outside the purview of the school and a violation of the First Amendment.

Whether the Supreme Court decisions on matters of Bible reading and prayers in the schools will lead inevitably to a test of the legality of religious holiday observations remains to be seen.

Government Aid to Education

Yet another aspect of the overall issue of religion and the schools is the degree to which government assistance may be rendered to students of parochial institutions. Opponents of such aid take the position that, in essence, this is aid to a religious or religiously-sponsored institution. Those who favor such aid point out that the benefit is for the student and his family and that the aid afforded the institution thereby is incidental. The law, as well as public opinion, is fairly split.

BUS TRANSPORTATION: In 1947, the Supreme Court decided (Everson v. Board of Education) that it was not unconstitutional for the State of New Jersey to furnish bus transportation to children in attendance at parochial schools under the same

terms and conditions as such transportation was furnished to public school students. The service was characterized as a "welfare benefit" for students.

At least eight states have affirmatively held to the contrary under their state constitutions. These are: Alaska, Delaware, Maine, Missouri, New Mexico, Oklahoma, Washington and Wisconsin. Pennsylvania, in 1963, defeated a bill providing for tax-paid bus transportation in behalf of parochial school children. In Ohio, the Attorney-General ruled that no authority existed for bus transportation to be furnished to students at private and parochial schools, but indicated that legislation providing such authority would be constitutional.

States which have upheld the validity of furnishing bus transportation are: California, Connecticut, Maryland, Massachusetts and New Mexico.

TEXTBOOKS: As early as 1930 (Cochran v. Louisiana State Board of Education) the Supreme Court held that it was constitutional for the states to enact statutes providing free textbooks for children in non-public schools. Yet, only four states--Louisiana, Mississippi, Rhode Island and West Virginia--now supply textbook aid for non-public schools. Seven other states which had previously provided such aid have since invalidated it.

TUITION: Some of the states whose courts have held that the use of State funds to pay parochial school tuition is invalid are: Kentucky, Mississippi, South Dakota, Vermont and Virginia.

FEDERAL AID: In a special message to Congress in January, 1963, President John F. Kennedy offered a comprehensive plan to provide funds for education from elementary through graduate school. A bill designed to carry out this program (H. S. 3000, described as the National Improvement Act of 1963) included aids for church-related as well as public educational institutions. In higher education, particularly, church-related schools were to be made eligible for massive aid: construction loans for academic facilities; loans and grants for the construction of library facilities and for books; grants for the expansion of graduate schools, applicable to construction, faculty, and

equipment; increased appropriations for foreign language studies; expansion of the scope of teacher institutes, and grants to strengthen the preparation of elementary- and secondary-school teachers and teachers of gifted, handicapped, and retarded children. In addition, there were provisions for loans, work-study programs, and graduate fellowships for students in church-related colleges. Among the provisions for elementary and secondary education, the bill extended the National Defense Education Act, which provided loans to parochial and other nonpublic schools for science, mathematics, and foreign-language teaching equipment.

In February, 1963, the House Education and Labor Committee began hearings on the bill. It soon became clear that the higher-education features would have fairly clear sailing. In May, the administration abandoned its comprehensive aid-to-education bill in favor of separate measures, and in August the House passed a college-aid bill, which included aid to church-related colleges. It overwhelmingly rejected an amendment which would have paved the way for judicial review of the church-state aspects of the measures.

In the Senate, Winston L. Prouty (Rep., Vt.) and Wayne Morse (Dem., Ore.) clashed over the constitutionality of grants, as distinguished from loans, to church-related colleges. Prouty favored grants and loans for construction purposes, calling it "patently absurd" to question the constitutionality of aiding the construction of science classrooms in church-related colleges. Morse, on the other hand, thought the church-related college should be excluded from tax-raised grants because it exercises a religious influence over its students, but that loans would not violate the First Amendment "if the interest covers the cost of the use of the money." Sam J. Ervin (Dem., N.C.) questioned the constitutionality of both loans and grants to church-controlled colleges and universities and offered an amendment for judicial review which was included in the bill adopted by the Senate.

In November, 1963, a House-Senate conference committee reached agreement on a bill, the Senate conferees yielding on the judicial-review section. Grants were for "academic facilities," especially "designed for instruction or research in the natural or physical sciences, mathematics, modern foreign languages, or engineering, or for use as a library" and for "for sec-

tarian instruction or . . . religious worship." The bill provided that if its conditions for the use of facilities were met, such facilities would become the property of the private institution after a period of 20 years. It authorized an expenditure of $1.195 billion for the first three years of a five-year program and provided for a reexamination of the program before funds were authorized for the remaining two years. In November the House approved the conference committee report 258-92. In signing the measure into law in December, 1963, President Lyndon B. Johnson called it the most significant education bill in history, the first broad assistance program for colleges since the Land Grant Act a century earlier.

The New York Times applauded the "great advance" represented by the college-aid bill, but regretted the "blurring of the lines of separation of church and state. The pragmatic compromise that took final form in the bill evolved from the almost insoluble mixtures of various degrees of church-relatedness in different colleges. What matters now is that the compromise be regarded as unfortunate, if perhaps necessary, step under the special circumstances of America's peculiar higher education system--and not as a foot in the door."

The college-aid bill was followed in 1965 by the first large-scale comprehensive bill dealing with elementary and secondary school education, the Elementary and Secondary Education Act of 1965. The Act does not provide for direct grants or loans to parochial schools or their students but several of its provisions do benefit these schools and their students. Under the Act, money is made available for special educational services and arrangements for the benefit of "educationally deprived children" in private elementary and secondary schools; for the acquisition of library resources, textbooks and other teaching materials and for supplemental educational centers and services. In 1965, Congress also passed the Higher Education Act of 1965. Aid is provided for both public and private institutions. There are provisions for college library assistance, training and research, for scholarship assistance and for grants to strengthen developing institutions. The implications of the church-state issue arising from all these bills have thus far been intentionally muted.

Notwithstanding what appears to be increasing restriction by judicial fiat on the admixture of religious and secular activities, in other areas, there appears to be relatively little challenge. Thus, the tax-exempt status of religious institutions appears quite secure, and recent tax legislation has, in fact, liberalized deductions taken for contributions to such institutions. Apparently, there is a distinction as to what it is appropriate to do with the tax dollar once collected as distinguished from the basis of exempting it from collection in the first place.

Similarly, seemingly inconsistent are such widely varied practices as the impression on coins of "In God We Trust," the mention of the deity in the pledge of allegiance, provision for chaplains in the Armed Forces, clergymen in service at sessions of Congress, presidential proclamations on Thanksgiving day and a host of other evidences that there is acknowledgment of a Supreme Being. Perhaps, the test is simply that, in the schools, where the setting is one of indoctrination, the religious objective has no place.

II. OTHER FIRST AMENDMENT ISSUES

To some extent, the issue of "freedom from religion" has tended to obscure that of "freedom of religion." But since the days of Roger Williams, the country has progressed increasingly toward acceptance of the minority point of view as dictated by religious conscience.

While, in general, the law follows the prescript that "we render to Caesar the things that are Caesar's," governmental tolerance of non-conformity based in religious conviction has broadened. Thus, while in 1940 (Minersville v. Gobitis) the power of the state to require the flag salute in public schools was upheld against the assertion by a family of Jehovah's Witnesses that this ceremony was contrary to their religious belief, three years later, (West Virginia v. Barnette) the Court reversed itself and came to the opposite conclusion.

In like manner, the treatment in World War II of "conscientious objectors" was far more sympathetic than it had been in World War I. However, religious belief has not been permit-