

To: The Chief Justice
Mr. Justice Black
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Goldberg

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SUPREME COURT OF THE UNITED STATES

Justice Douglas, J.

Nos. 142 AND 119.—OCTOBER TERM, 1962.

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Recirculated:

School District of Abington } On Appeal From the
Township, Pennsylvania, et } United States District
al., Appellants, } Court for the Eastern
142 v. } District of Pennsyl-
Edward Lewis Schempp et al. } vania.

William J. Murray III, etc., }
et al., Petitioners, }
119 v. } On Writ of Certiorari to
John N. Curlett, President, et } the Court of Appeals of
al., Individually, and Con- } Maryland.
stituting the Board of }
School Commissioners of }
Baltimore City. }

[June —, 1963.]

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court and add a few words in explanation.

While the Free Exercise Clause of the First Amendment is written in terms of what the State may not require of the individual, the Establishment Clause, serving the same goal of individual religious freedom, is written in different terms.

Establishment of a religion can be achieved in several ways. The church and state can be one; the church may control the state or the state may control the church; or the relationship may take one of several possible forms of a working arrangement between the two bodies.¹ Under

¹ See Bates, Religious Liberty: An Inquiry (1945), 9-14, 239-252; Cobb, Religious Liberty in America (1902), 1-2, cc. IV, V; Gledhill, Pakistan, The Development of its Laws and Constitution (8 British

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all of these arrangements the church typically has a place in the state's budget, and church law usually governs such matters as baptism, marriage, divorce and separation, at least for its members and sometimes for the entire body politic.² Education, too, is usually high on the priority list of church interests.³ In the past, schools were often made the exclusive responsibility of the church. But today in some state-church countries the state runs the public schools, but compulsory religious exercises are often required of some or all students. Thus, under the agreement Franco made with the Holy See when he came to power in Spain, "The Church regained its place in the national budget. It insists on baptising all children and has made the catechism obligatory in state schools."⁴ }

The vice of all such arrangements under the Establishment Clause is that the state is lending its assistance to a church's efforts to gain and keep adherents. Under the First Amendment it is strictly a matter for the individual and his church as to what church he will belong to and how much support, in the way of belief, time, activity or money, he will give to it. "This pure Religious Liberty" "declared . . . [all forms of church-state relationships] and their fundamental idea to be oppressions of conscience and abridgments of that liberty which God and nature had conferred on every living soul."⁵

{ In these cases we have no coercive religious exercise }
 { aimed at making the students conform. }

Commonwealth, 1957), 11-15; Keller, Church and State on the European Continent (1936), c. 2; 1 Stokes, Church and State in the United States (1950), 151-169.

² See III Stokes, *op. cit.*, *supra*, n. 1, 42-67; Bates, *op. cit.*, *supra*, n. 1, 11, 245-246; Gledhill, *op. cit.*, *supra*, n. 1, 128.

³ See II Stokes, *op. cit.*, *supra*, n. 1, 488-548; Freund, Muslim Education in West Pakistan, 56 Religious Education 31.

⁴ Bates, *op. cit.*, *supra*, n. 1, at 18.

⁵ Cobb, *op. cit.*, *supra*, n. 1, at 2.

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The prayers announced are not compulsory, though some may think they have that indirect effect because the nonconformist student may be induced to participate for fear of being called an "odd-ball." But that coercion, if it be present, has not been shown; so the vices of the present regimes are different.

} No coercion

These regimes violate the Establishment Clause in two different ways. In each case the State is conducting a religious exercise; and, as the Court holds, that cannot be done without violating the "neutrality" required of the State by the balance of power between individual, church and state that has been struck by the First Amendment. But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want. In my view, that may not be done, directly or indirectly.

FACILITIES & FUNDS

The most effective way to establish any institution is to finance it; and this truth is reflected in the fevered appeals by church groups for public funds to finance their religious schools.⁶ Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one may be technically separable from budgets for the other.⁷ But the institution is an insepa-

Education activity
as well as religious
condemned.

⁶ See II Stokes, *op. cit.*, *supra*, n. 1, at 681-695.

⁷ See Accountants' Handbook (4th ed. 1956) 4.8-4.15.

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nable whole, a living organism which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.

Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended, as this case illustrates; it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that "no law respecting an establishment of religion" shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.