1961

Some Current Issue in Church and State

Leo Pfeffer

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Leo Pfeffer, Some Current Issue in Church and State, 13 W. Res. L. Rev. 9 (1961)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol13/iss1/5

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
Some Current Issues in Church and State

Leo Pfeffer

(The author maintains that the "wall of separation between church and state," which many had thought to be crumbling, has again been made whole by the Supreme Court. Analyzing the Court's decisions in the Sunday law and religious oath-taking cases of last term in the light of the religious or secular nature of the issues involved, he concludes that the Court has reaffirmed its earlier broad interpretation of the first amendment. Suggesting that the establishment and free exercise clauses of that amendment are really "co-extensive and correlative" ideas, the author examines from this viewpoint the constitutional problems raised by federal aid to parochial schools and by religious instruction in public schools.—Ed.)

THE MEANING OF THE ESTABLISHMENT CLAUSE

The first amendment was added to the Constitution in 1791, but it was not until more than a century and a half later that the Supreme Court felt called upon to provide a definitive interpretation of the amendment's ban on laws respecting an establishment of religion. The author (B.S.S., College of the City of New York, J.D., New York University) is General Counsel of the American Jewish Congress and a member of the New York and United States Supreme Court Bars. In 1947, in Everson v. Board of Education, and in the following year, in People ex rel. McCollum v. Board of Education, the Court specifically interpreted the amendment as barring all aid to religion and as erecting a wall of separation between church and state. In both cases the Court interpreted the amendment (made applicable to the states by the fourteenth) in the following comprehensive language:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force

The author maintains that the "wall of separation between church and state," which many had thought to be crumbling, has again been made whole by the Supreme Court. Analyzing the Court's decisions in the Sunday law and religious oath-taking cases of last term in the light of the religious or secular nature of the issues involved, he concludes that the Court has reaffirmed its earlier broad interpretation of the first amendment. Suggesting that the establishment and free exercise clauses of that amendment are really "co-extensive and correlative" ideas, the author examines from this viewpoint the constitutional problems raised by federal aid to parochial schools and by religious instruction in public schools.—Ed.)

THE MEANING OF THE ESTABLISHMENT CLAUSE

The first amendment was added to the Constitution in 1791, but it was not until more than a century and a half later that the Supreme Court felt called upon to provide a definitive interpretation of the amendment's ban on laws respecting an establishment of religion. The author (B.S.S., College of the City of New York, J.D., New York University) is General Counsel of the American Jewish Congress and a member of the New York and United States Supreme Court Bars. In 1947, in Everson v. Board of Education, and in the following year, in People ex rel. McCollum v. Board of Education, the Court specifically interpreted the amendment as barring all aid to religion and as erecting a wall of separation between church and state. In both cases the Court interpreted the amendment (made applicable to the states by the fourteenth) in the following comprehensive language:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force

The author maintains that the "wall of separation between church and state," which many had thought to be crumbling, has again been made whole by the Supreme Court. Analyzing the Court's decisions in the Sunday law and religious oath-taking cases of last term in the light of the religious or secular nature of the issues involved, he concludes that the Court has reaffirmed its earlier broad interpretation of the first amendment. Suggesting that the establishment and free exercise clauses of that amendment are really "co-extensive and correlative" ideas, the author examines from this viewpoint the constitutional problems raised by federal aid to parochial schools and by religious instruction in public schools.—Ed.)

THE MEANING OF THE ESTABLISHMENT CLAUSE

The first amendment was added to the Constitution in 1791, but it was not until more than a century and a half later that the Supreme Court felt called upon to provide a definitive interpretation of the amendment's ban on laws respecting an establishment of religion. The author (B.S.S., College of the City of New York, J.D., New York University) is General Counsel of the American Jewish Congress and a member of the New York and United States Supreme Court Bars. In 1947, in Everson v. Board of Education, and in the following year, in People ex rel. McCollum v. Board of Education, the Court specifically interpreted the amendment as barring all aid to religion and as erecting a wall of separation between church and state. In both cases the Court interpreted the amendment (made applicable to the states by the fourteenth) in the following comprehensive language:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force

The author maintains that the "wall of separation between church and state," which many had thought to be crumbling, has again been made whole by the Supreme Court. Analyzing the Court's decisions in the Sunday law and religious oath-taking cases of last term in the light of the religious or secular nature of the issues involved, he concludes that the Court has reaffirmed its earlier broad interpretation of the first amendment. Suggesting that the establishment and free exercise clauses of that amendment are really "co-extensive and correlative" ideas, the author examines from this viewpoint the constitutional problems raised by federal aid to parochial schools and by religious instruction in public schools.—Ed.)

THE MEANING OF THE ESTABLISHMENT CLAUSE

The first amendment was added to the Constitution in 1791, but it was not until more than a century and a half later that the Supreme Court felt called upon to provide a definitive interpretation of the amendment's ban on laws respecting an establishment of religion. The author (B.S.S., College of the City of New York, J.D., New York University) is General Counsel of the American Jewish Congress and a member of the New York and United States Supreme Court Bars. In 1947, in Everson v. Board of Education, and in the following year, in People ex rel. McCollum v. Board of Education, the Court specifically interpreted the amendment as barring all aid to religion and as erecting a wall of separation between church and state. In both cases the Court interpreted the amendment (made applicable to the states by the fourteenth) in the following comprehensive language:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."
2. 330 U.S. 1 (1947) (upholding transportation to parochial schools at public expense).
him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."\(^4\)

In *Everson* this paragraph was no more than dictum, since the holding of the case was that the amendment was not violated by the statute providing for payment of transportation to parochial schools out of tax-raised funds. For that reason it attracted little attention. In *McCollum*, however, it was decisive and required the invalidation of the assailed program of religious instruction within the public schools. It was after *McCollum* that this definitive interpretation of the establishment clause became subject to considerable criticism and attack, some of it quite intemperate, as a misreading of history and a distortion of the intent of the framers of the amendment.\(^5\) It was not, these critics contended, the purpose of the first amendment to divorce religion from government or to impose neutrality between believers and non-believers, but only to meet in a practical way the problems raised by the existence of a multiplicity of sects. This was done by requiring the government to be neutral as among these sects and forbidding it to favor one at the expense of the others. The amendment was not intended to bar the government from aiding or supporting religion and religious institutions so long as the aid and support is granted equally and without preference to some faiths or discrimination against others. In effect, the amendment was intended as a sort of "equal protection" clause among religious groups.

The proof of this, according to the critics of the Court's interpretation in *Everson* and *McCollum*, was to be found in the history of our country and in the society about us. Throughout its history, our governments, national and state, have co-operated with religion and shown friendliness to it. God is invoked in the Declaration of Independence\(^6\) and in practically every state constitution. Sunday, the Christian Sabbath, is universally observed as a day of rest. The sessions of Congress and of the state legislatures are invariably opened with prayer, in Congress by

---


6. Though not mentioned at all in the Constitution.
chaplains who are employed by the federal government. We have chap-
lains in our armed forces and in our penal institutions. Oaths in courts
of law are administered through the use of the Bible. Public officials
take an oath of office ending with "so help me God." Religious institu-
tions are tax exempt throughout the nation. Our Pledge of Allegiance
declares that we are a nation "under God." Our national motto is "In
God We Trust," which is inscribed on our currency and our postage
stamps.

Four years of this intense criticism was followed by the Court's deci-
sion in Zorach v. Clauson. Whether a causal relationship existed be-
tween that decision and the campaign of criticism is a matter for specula-
tion on the part of historians of the Court. It seemed clear that the
language used by Justice Douglas, if not the holding itself, manifested a
discreet withdrawal from the forward position taken in Everson and Mc-
Collum. The holding itself was quite narrow: that McCollum did not
bar releasing children for off-school religious instruction where the pub-
lic school in no way participated in that instruction or did anything other
than adjust its schedule so as to accommodate the religious needs of the
children.

The apparent retreat from McCollum was found in the language.
"We are," said Justice Douglas speaking for six of the nine members of
the Court, "a religious people whose institutions presuppose a Supreme
Being." The first amendment "does not say that in every and all respects
there shall be a separation of Church and State." It requires only that
"there shall be no concert or union or dependency one on the other."

True enough, the opinion expressly stated: "We follow the McCol-
lum case," and stated further: "Government may not finance religious
groups nor undertake religious instruction . . .," a statement hardly con-
sistent with any interpretation of the first amendment other than that of
Everson-McCollum. But these statements were largely overlooked, and
there was undoubtedly a good deal of support for the view expressed by
Professor Paul Kauper that "all students of this subject may well agree
that Zorach for all practical purposes overruled McCollum." This was
so particularly in view of the fact that in Zorach the Court apparently de-
liberately refrained from reiterating — as it had done in McCollum —
the definitive interpretation of the amendment set forth in Everson in the
paragraph beginning, "The 'establishment of religion' clause of the First
Amendment means at least this . . . ."

To what extent Zorach actually manifested a repudiation of the basic
interpretation of the Everson-McCollum cases and to what extent this

view of Zorach reflected wish-fulfillment need not now be considered. Two decisions handed down in the past term of the Court make it clear — at least to the extent that anything can be clear in constitutional law — that the Everson-McCollum broad interpretation of the establishment clause is still very much alive.

In the first of these decisions, McGowan v. Maryland, Chief Justice Warren, speaking for six members of the Court in a decision upholding a state Sunday law, went out of his way to do what was not done in Zorach — reiterate verbatim the Everson-McCollum definitive paragraph. And Justice Douglas used the occasion of his dissent to explain his statement in Zorach that "we are a religious people whose institutions presuppose a Supreme Being." Its purpose was to indicate that the "Puritan influence helped shape our constitutional law and our common law" in that it "put individual conscience and individual judgment in the first place."

In the second of the cases, Torcaso v. Watkins, the Court's opinion was written by Justice Black, the author of the opinions in Everson and McCollum. In invalidating under the first amendment a state requirement that holders of public office qualify by taking an oath expressing their belief in the existence of God, Justice Black again reiterated in full the definitive Everson-McCollum paragraph. He pointed out that although in McCollum the Court had been urged to repudiate the paragraph as dictum, it "declined to do this, but instead strongly reaffirmed what had been said in Everson, calling attention to the fact that both the majority and the minority in Everson had agreed on the principles declared in this part of the Everson opinion."

Referring specifically to the court below but undoubtedly having in mind also many others, he stated:

The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in Zorach v. Clauson, 343 U.S. 306, ... had in part repudiated the statement in the Everson opinion quoted above and previously reaffirmed in McCollum. But the Court's opinion in Zorach specifically stated: "We follow the McCollum case."

While the decision in Torcaso v. Watkins was unanimous, Justices Frankfurter and Harlan concurred only in the result. The same two Justices had joined in a separate concurring opinion in McGowan v. Maryland, and the former (Justice Harlan was not yet then on the
Bench) had concurred specially in *McCollum* and had dissented in *Everson*. Thus, neither of these two Justices have ever specifically endorsed the *Everson-McCollum* paragraph. Nevertheless, Justice Frankfurter could hardly have dissented in both *Everson* and *Zorach* without at least having accepted the substance of the paragraph; indeed, the burden of the dissent in *Zorach* was that the majority there had refused to apply what was logically required by *McCollum*. Justice Frankfurter himself said in his dissent in *Zorach* that the "result in the *McCollum* case . . . was based on principles that received unanimous acceptance by this Court, barring only a single vote."

Nor can one justify the concurrence by Justices Frankfurter and Harlan in the result in *Torcaso* except on the basis of the substance of the *Everson-McCollum* interpretation of the first amendment. It is true that the appellant's brief in *Torcaso* also invoked the equal protection clause of the fourteenth amendment, but in the Sunday Law Cases Justices Frankfurter and Harlan accorded to states almost unlimited discretionary judgment in making legislative classifications under that clause. Since it is hardly possible to assume that such discretionary judgment would not encompass a differentiation between believers and non-believers in the appointment of notaries empowered to administer oaths, the concurrence of Justices Frankfurter and Harlan in *Torcaso* may be explained only on the ground that they interpreted the first amendment as barring government from making such a differentiation in according governmental benefits.

It is therefore safe to say that the interpretation of the first amendment contained in the *Everson-McCollum* paragraph reflects the views of every member of the present Court. It must be remembered, too, that only three of the Justices who participated in *Everson* and *McCollum* (Black, Frankfurter and Douglas) are still on the Court and that the Sunday Law Cases and *Torcaso v. Watkins* were passed upon by six new Justices, all of whom now indicate their concurrence in the *Everson-McCollum* interpretation of the first amendment. It may therefore be hoped that in view of this latest expression of the Court, two-thirds of whose members were appointed after the *Everson* and *McCollum* decisions, the issue will be put to rest and it will be accepted by all that the first amendment is to be broadly interpreted as barring not only preferential aid but all aid to religion and as erecting a wall of separation between church and state.19

---

FEDERAL AID TO PAROCHIAL SCHOOLS

The relevance of the meaning of the establishment clause to the current controversy regarding the inclusion of parochial schools in a program of federal aid for public schools is quite apparent. If the clause is interpreted as barring only preferential governmental aid to religion, obviously no constitutional barrier precludes the granting of federal funds to religious schools of all faiths so long as no sect is favored and none discriminated against. Indeed, some proponents of federal aid for parochial schools, acting on the assumption that the Everson-McCollum interpretation has been vitiated by Zorach, took this approach. But the opinions in McGowan v. Maryland and Torcaso v. Watkins seem now to foreclose it.

Perhaps because of this, the emphasis on the part of the proponents of federal aid to parochial schools has shifted from the establishment clause to the free exercise clause. The claim is that the exclusion of parochial schools from a program of federal aid to public schools infringes upon religious liberty. The argument in support of this claim runs something like the following.

In 1925, in the case of Pierce v. Society of Sisters, the Supreme Court ruled that it would be an infringement upon the religious liberty of Catholic parents to compel them to send their children to public schools in violation of their conscience. However, many Catholic parents cannot afford to pay the tuition required to keep their children in parochial schools in addition to the taxes they pay to maintain the public schools. Hence, unless the government, by granting financial aid to the parochial schools, makes it economically feasible for the parents to send their children to such schools, the guaranty of religious liberty declared in the Pierce case becomes a vain and empty promise. Exercise of religion which is financially prohibitive, it is asserted, cannot be called the free exercise of religion.

Before considering the merits of this claim, a word should be said regarding its implications. By virtue of the fourteenth amendment the free exercise clause is as applicable to the states as it is to the federal government. Moreover, compulsory school attendance laws are not federal but state laws, and it is the states that finance public education. If the interpretation of the free exercise clause given in the preceding paragraph is correct, then it follows that the support of parochial schools out

20. The controversy is hardly a new one. For discussions of earlier phases see Pfeffer, Church, State and Freedom 478-94 (1953); Mitchell, Religion and Federal Aid to Education, 14 Law & Contemp. Prob. 113 (1949).
of tax-raised funds is not merely a right of the states but a constitutional obligation, at least so long as the states retain their compulsory school attendance laws and maintain public schools out of tax-raised funds.\textsuperscript{23}

The religious liberty claim rests on a premise often asserted by many who contested the broad interpretation of the establishment clause expressed in \textit{Everson} and \textit{McCollum}. The premise is that the establishment and free exercise commands are not mandates of equal value. The principal intent of the fathers of the Bill of Rights was to secure religious freedom, and the prohibition of establishment was inserted merely as a means to assure that freedom.\textsuperscript{24} Accordingly, should there be an occasion where strict adherence to separation would infringe upon religious freedom, the former must yield to the latter, else the end would be sacrificed for the means. It follows from this that even if federal aid to parochial schools would not be consistent with the establishment clause, at least as interpreted in \textit{Everson-McCollum}, it is constitutionally permitted, if not required.

I find nothing in American constitutional history or tradition to justify an apportionment of values between separation of church and state and religious liberty or indeed to justify the dichotomy itself. The struggle for religious freedom and for disestablishment were parts of the same single evolutionary process that culminated in the first amendment. Long before \textit{Everson} and \textit{McCollum}, Professor Ruffini noted that "religious liberty and separation have become in America two terms which, ideally, historically and practically, are inseparable."\textsuperscript{25} In his dissent in \textit{Everson}, Justice Rutledge expressed the same thought: "'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."\textsuperscript{26}

In the first of the Sunday Law Cases decided in the past term of the Supreme Court, Chief Justice Warren, speaking for the majority of the Court, rejects the contention that "the purpose of the 'establishment' clause is only to insure protection for the 'free exercise' of religion," and that it has no independent force of its own. "The writings of Madison," he said, "who was the First Amendment's architect, demonstrated that the establishment of religion was equally feared because of its tendencies to

\textsuperscript{23} In \textit{Everson} the Court stated that it did "not mean to intimate that a state could not provide transportation only to children attending public schools." 330 U.S. 1, 16. See Connell v. Board of School Directors, 356 Pa. 585, 52 A.2d 580 (1947), affirming the judgment of the court below. See also PFEFFER, CHURCH, STATE AND FREEDOM 477-78 (1955).


\textsuperscript{25} RUFFINI, \textit{RELIGIOUS LIBERTY} 16 (1912).

\textsuperscript{26} 330 U.S. 1, 40. For further discussion of this point see Pfeffer, \textit{The Case for Separation}, in RELIGION IN AMERICA 52 (Cogley ed. 1958).
political tyranny and subversion of civil authority."\(^{27}\) This means that government conduct, federal or state, which impairs the separation of church and state is unconstitutional, even if it does not appear to infringe upon the free exercise of religion.

However, completely aside from any supposed conflict between separation and free exercise in respect to federal aid to education, I find it difficult to grasp the reasoning behind the claim that exclusion of parochial schools from the program infringes upon religious freedom. If the right of Catholic parents to send their children to parochial rather than public schools is a constitutionally-protected exercise of freedom of religion it is so only because the Supreme Court has so held in the *Pierce* case, since under our system of government the Supreme Court is the final authority on constitutional rights.\(^{28}\) But the same Supreme Court which in 1925 held in the *Pierce* case that the State of Oregon could not compel parents to send their children exclusively to public schools also held in *Everson* in 1947, *McCollum* in 1948, and *Zorach* in 1952, that the government may not finance religious schools or religious education. If the latter three decisions are inconsistent with the former, then it would seem that they have overruled it, not only because they are three decisions against one, but because they are later decisions and therefore supersede earlier inconsistent ones.

Of course, the *Pierce* case has not been overruled or superseded and remains today sound constitutional law. But the reason for this is simply that it is not inconsistent with the *Everson-McCollum-Zorach* principle that the government may not finance church schools. It is one thing to say that religious liberty forbids the government from closing down church schools, as the Oregon legislature sought to do in the *Pierce* case; it is something entirely different to say that religious liberty also requires the government to finance these schools.

In the late 1930's and early 1940's the Supreme Court ruled in a number of cases that the states could not ban distribution of literature by the Jehovah's Witnesses even though the literature violently attacked the Catholic Church and the Catholic religion. The Court held that the Witnesses were exercising their religious liberty.\(^{29}\) But can it be seriously contended that the Jehovah's Witnesses could demand that the government print its literature — or, to make the analogy even closer, give them money so that they could buy and maintain printing presses because they were not satisfied with the government presses?

---

28. Every claim of religious liberty in respect to federal aid to education that I have come across rests exclusively on the *Pierce* case.
True enough, there is no compulsion, other than that of conscience, in the Jehovah's Witnesses' distribution of their literature whereas there is compulsion to secure for one's children a minimum secular education.\textsuperscript{30} However, this is hardly a critical distinction. During the past decade there has been a growing movement to fluoridate the water supply in order to protect the teeth of our children. Many municipalities have engaged in the program. But drinking fluoridated water violates the conscience of Christian Scientists. A number of suits have been brought to stop the program, but all have proved unsuccessful and the Supreme Court has refused to interfere with these decisions.\textsuperscript{31} It would undoubtedly be a great expense for Christian Scientists living in communities with a fluoridated water supply to purchase unfluoridated water as required by their conscience. Yet I have not come across a single report of a demand by Christian Scientists that the government give them money so that they can buy such water and thus be economically able to exercise their freedom of religion. I doubt very much that, if such a demand were made, serious consideration would be given to it by the courts.

It is important to note that religious liberty was not the only liberty implicit in the Pierce case. (Indeed the claim of infringement of religious liberty was not raised by the parties, nor is "religious liberty" or "freedom of religion" or a similar phrase even mentioned in the opinion.) What is commonly referred to as the Pierce case involved two separate cases concerning two separate schools. One was a Catholic parochial school conducted by the Society of the Sisters of the Holy Names of Jesus and Mary. The other was the Hill Military Academy in which, as far as the record shows, not even the Lord's Prayer was recited. A single judgment was issued in both cases and a single opinion written to cover both cases. The Court quite clearly decided that a parent who is not in the least motivated by religious consideration has an equal constitutional right to send his child to a private secular rather than public school. Can it be said that in such a case he is being deprived of religious liberty if the state does not give him the money he needs to send his child to a private secular school? Obviously not, and the reason is simply that it is no deprivation of religious liberty for the government not to finance a competing educational system, whether it be religious or secular.

There is a religious liberty issue in the question of federal aid for parochial schools, but it is one very much different from that asserted by the


proponents of such aid. Rather than religious liberty being infringed upon by the exclusion of parochial schools from federal aid, the reverse is closer to the truth. The most serious infringement upon religious liberty before our Bill of Rights was adopted was the use of tax-raised funds for religious purposes. In the great Virginia Statute establishing religious freedom it was eloquently stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." Is it not a violation of the religious liberty of Catholics to compel them to pay for the propagation of the faith of Jehovah's Witnesses, or a violation of the religious liberty of Jehovah's Witnesses to compel them to pay for the propagation of the Catholic faith? And is this not exactly what happens when tax-raised funds are used to finance church schools?

THE BIBLE IN THE SCHOOLS

The Procedural Issue: Standing To Bring Suit

Twice during its past term the Supreme Court has again shown that it is rarely possible to force it to pass on an issue when a majority of the Court does not want to do so. In 1943, the Court dismissed for want of standing a suit brought by a physician challenging Connecticut's anti-birth control law. Learning the lesson of that decision, the law and medical faculties of Yale University conspired to compel the Court to pass on the issue by making sure that the plaintiffs' standing to sue could not be successfully challenged. Accordingly, suit (for declaratory judgment) was brought not only on behalf of a physician (head of the department of gynecology at Yale Medical School) but also on behalf of two married couples who alleged that contraceptive treatment was necessary in the one case to prevent birth of infants with congenital abnormalities and in the other to prevent probable loss of the wife's life should she become pregnant. But, alas, all this was to no avail. A majority of the Court held that since the statute was actually not enforced and contraceptive treatment and devices are freely available in Connecticut without "realistic fear of prosecution," there was no real or substantial controversy for the Court to adjudicate.

A Pennsylvania citizen seeking a Supreme Court determination of a Bible reading statute was no more successful. In 1952 the Court had dis-

32. 12 Laws of Va. 80 (Hening 1823).
33. Or to prevent it from passing on an issue when it does want to. See Mapp v. Ohio, 367 U.S. 643 (1961).
34. Tileston v. Ullman, 318 U.S. 44 (1943). Pierce v. Society of Sisters, 268 U.S. 510 (1925), would have constituted adequate precedent for accepting jurisdiction had the court wished to do so.
35. Poe v. Ullman, 367 U.S. 497 (1961). (Attorney for the plaintiffs was Professor Fowler Harper of the Yale Law School.)
missed an appeal from a New Jersey Supreme Court decision upholding a statute providing for daily Bible reading in the public schools, on the ground that the plaintiff had lost his standing by reason of the fact that his child had graduated from school by the time the appeal reached the Supreme Court. For this reason, the Pennsylvania plaintiff, also having learned the lesson, brought his suit while his children were in the lower grades in school, so that notwithstanding the law's delays, they would still be in school by the time the case reached the Supreme Court.

The plaintiff was successful in the lower court. In *Schempp v. School District of Abington Township*, a three-judge Federal District Court ruled the statute unconstitutional. An appeal was taken by the school board to the Supreme Court. While the appeal was pending, the Pennsylvania legislature amended the statute so as to provide that any child bringing a written request from his parent was to be excused from participating in the Bible reading exercise. On the basis of this amendment the school board moved the District Court to vacate the judgment (enjoining the practices complained of) and to dismiss the complaint for mootness. The District Court ruled, however, that since an appeal had already been commenced, it had no further jurisdiction. The Supreme Court, however, granted the motion to the extent of vacating the judgment and remanding the suit to the District Court for further proceedings in the light of the statutory amendment.

An amendment to a statute declared unconstitutional should not moot the (injunction) judgment unless the amendment is truly material, *i.e.*, unless it is probable that the judgment would have been different had the amendment antedated the suit, else a legislature could abort the judgment by repeated enactment of inconsequential amendments. The amendment to the Pennsylvania statute is relevant to the issue of compulsion versus voluntariness; but how critical was that issue to the ultimate determination of the suit?

*The Substantive Issue: The Bible, the Schools, and the Establishment Clause*

The complaint in the *Schempp* suit attacked the Bible reading practices under both the establishment and free exercise clauses of the first amendment. While the issue of voluntariness versus compulsion was no doubt relevant in respect to the attack on the practices under the free ex-

ercise aspect of the case, it was hardly relevant in respect to the establishment aspect. Here the critical test is not compulsion (although in respect to religious practices or teachings compulsion would violate the establishment ban as well as the free exercise guaranty), but state aid to religion. Hence, even if pupil participation in the religious practices were entirely voluntary, the first amendment’s ban on establishment would still be violated by the aid accorded religion by the state through its public school system and by state participation in religious affairs.

This was stated in the Supreme Court’s opinion in *McCollum*. There the Court said:

Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any of the following reasons: . . . (2) the religious education program was voluntary in name only because in fact subtle pressures were brought to bear on the students to force them to participate in it . . .

In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend.

This is the clear, unambiguous opinion of the majority of the Supreme Court. It held that the involvement by the Champaign public school authorities in religious education and practices was unconstitutional whether pupil participation was in fact voluntary or involuntary. The reason for this is that the Court found the Champaign program unconstitutional under the establishment ban and therefore did not find it necessary to consider the free exercise guaranty.

In the *Schempp* case the District Court first invalidated the Pennsylvania statute on the ground that it violated the establishment clause as interpreted in *Everson* and *McCollum*. “In our view,” the court said, “inasmuch as the Bible deals with man’s relationship to God and the Pennsylvania statute may require a daily reminder of that relationship, the statute aids all religions. Inasmuch as the ‘Holy Bible’ is a Christian document, the practice aids and prefers the Christian religion.” Thus the court found an even greater violation of the establishment clause than in the *McCollum* case, for it found that the statute aided all religions and also preferred the Christian religion, whereas in the *McCollum* case the Supreme Court found it unnecessary to pass on the claim of preferential treatment to a particular faith.

Had the District Court possessed prophetic vision it may well have stopped at that point. However, in an effort to make assurance triply sure (it had already made it doubly sure by adding the preference finding) it held that the statute also violated the free exercise mandate. Even

41. 333 U.S. 203, 207.
43. 333 U.S. 203, 207.
if this is not to be deemed a subsidiary holding, it is certainly an independent one and one clearly not necessary to the District Court's judgment.

For my part, I find it difficult to understand the Supreme Court's action except in terms of a wish to avoid or at least delay deciding the issue on the merits. However, the issue is on its way up to the Court in a case decided earlier this year by a trial court in Miami, Florida. There the trial court upheld a Bible reading statute on the basis of a school board policy (not expressly authorized in the statute) to excuse from attendance children whose parents so request. Either by express statutory provision or by school regulation or policy, this is probably universal practice in American public schools, not only in respect to Bible reading but all religious practices and instruction. Hence, it is important that the issue be decided by the Supreme Court, and it is perhaps worthwhile that something more be said of it here.

The definitive interpretation of the establishment clause in Everson and McCollum makes it clear that compulsion may effect a violation of that clause as well as of the free exercise clause. But not all compulsion necessarily violates the establishment ban; there are certain types of compulsion which will not constitute a law respecting an establishment of religion, and yet constitute one prohibiting the free exercise thereof.

The test, as elicited from the relevant Supreme Court decisions appears to be as follows: If compulsion is exercised to impel participation in religious conduct, it constitutes a law respecting an establishment of religion as well as one prohibiting the free exercise thereof. If, on the other hand, it impels participation in secular conduct, it can only be a law prohibiting the free exercise of religion.

Thus, as the Everson and McCollum cases state, it would be a violation of the establishment ban to "force...a person to go to...church...or...to profess a belief or disbelief in any religion." Going to church and professing belief in religion are obviously religious acts and

44. The court might have disposed of the case on the basis of federal abstention until the statute had been challenged in the state courts. See Harrison v. NAACP, 360 U.S. 167 (1959). This may yet be the fate of the suit should the District Court stick to its judgment.
46. In the Miami case the policy of excusing children applied to all religious practices and instruction. Nevertheless, the trial court enjoined the showing of religious films to public school children during school hours, the presentation of Christmas, Easter and Hanukkah ceremonies containing religious elements, and the use of public school premises for religious instruction after school hours.
47. "Neither a state nor the Federal Government...can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining religious beliefs or disbeliefs, for church attendance or non-attendance...." 330 U.S. 1, 15; 333 U.S. 203, 210.
coerced participation establishes religion no less than it prohibits its free exercise.

On the other hand, non-polygamous marriages, military training and bearing arms in defense of the nation in wartime, vaccination to prevent the spread of communicable disease, and saluting the flag and pledging allegiance to it, are all deemed by the general community and the courts to be secular rather than religious conduct, and compulsory participation therein does not violate the ban on establishment of religion, although it may (or may not) violate the ban on laws prohibiting the free exercise of religion.

The distinction is a critical one. For if the act is secular it is within the constitutional competence of the state, and therefore the sole question remaining is whether a particular religiously-motivated person has a constitutional right under the free exercise clause to be excused from participating therein. (This, according to the Court's decisions, depends upon the balancing of the secular needs of the community against the religious rights of the individual.) On the other hand, if the conduct is religious, then it is outside the competence and jurisdiction of the state or its instrumentalities, and even if participation were not compulsory, the conduct would be unconstitutional.

It follows from this that the appropriate judicial remedy will differ in the two types of cases. If only free exercise is involved because the conduct in question is secular, the sole right of the religiously-motivated dissenter is to be excused from participation, but not to have the practice terminated. Conversely, if establishment is involved because the conduct in question is religious, the constitutional redress is not to excuse the dissenter but to discontinue the practice (for the state has no constitutional power to enter into it in the first place.)

An examination of the Barnette, Everson, McCollum and Zorach cases will illustrate this distinction. In West Virginia State Board of Education v. Barnette, the Supreme Court held that children of Jehovah's Witnesses could not be compelled by public school authorities to participate in the flag salute ceremony. Such coercion, it was held, prohibited the free exercise of their religion in a manner forbidden by the Constitution. Since, however, the ceremony is generally deemed a patriotic or secular one, rather than a religious one, there was no suggestion that the public school authorities were required to discontinue it as part of the regular public school program.

49. In re Summers, 325 U.S. 561 (1945); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934); Arver v. United States, 245 U.S. 366 (1918).
52. Ibid.
In *Everson*, the Court by a vote of five to four upheld the use of public funds to transport children by bus to private and parochial schools. The majority held that this was secular conduct whose purpose it was to protect children from the hazards of the road. (The Court interpreted the challenged statute to apply to all private schools, secular as well as religious.) Hence, there was no violation of the establishment ban, even though the public funds so expended were raised by compulsory taxation of citizens.

In *McCollum*, the conduct complained of was clearly religious. Hence, the Court did not issue a judgment which would simply have secured the right of the plaintiff's child not to participate therein, but decreed that the conduct should be discontinued and eliminated.

In *Zorach*, a majority of the Court held that the gravamen of the plaintiffs' complaint was that public school sessions continued while off-premises religious instruction was taking place. Under this analysis of the case, the Court majority held that there was no violation of the establishment ban since the conduct — continuation of secular instruction — was purely non-religious.

Religion may itself be the subject of secular instruction. Nothing in the first amendment or in the *Everson-McCollum* interpretation thereof requires the complete exclusion of religion or references to God from the public schools. The first amendment is not violated if, for example, the Bible is studied in the public schools as a work of literature, or Handel's *Messiah* as a work of music, or *The Last Supper* as a work of art. Nor can it be contended that the influence of religion and religious institutions upon history may not be studied in the public schools. No violation of the establishment ban is involved in any of these since literature, music, art, and history are all secular subjects properly within the competence of the public school teaching authorities.

What is unconstitutional is the inculcation of religious beliefs or the conducting of religious programs. It is constitutional to study the Bible as a work of literature; it is, I believe, unconstitutional to read it as an act of devotion. If the approach to the Bible or religious music or art is one of intellectual study, it is proper in the public schools; if the approach is one of worship or faith, it belongs in the home, church, or synagogue.

This distinction is implicit in Justice Jackson's concurring opinion in the *McCollum* case. Agreeing with the Court's decision that released time classes on public school premises were unconstitutional, he warned against complete exclusion of religion from the curriculum, saying:53

Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach

either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

Because he feared that the scope of the Court's mandate might be construed to cast doubt upon the constitutionality of such inclusion of religion in the public school curriculum, Justice Jackson found it necessary to write a concurring opinion. However, as far as the basic problem of religious indoctrination or worship was concerned, he was completely in accord with the other seven Justices. Indeed, the subsequent Zorach case indicates that he would even have gone further, for there he dissented from a majority opinion which permitted off-school released time programs.

It is probable, too, that it was to this type of religious matter in the public school that Justice Jackson was referring in his remark that "it may be doubted whether the Constitution, which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity in religion, politics, behavior or dress." A Jehovah's Witness child who refuses to salute the flag or pledge allegiance to it (Justice Jackson wrote the majority opinion in the Barnette case), a Christian Scientist child who refuses to attend the biology class, or a Jewish child who stays away from school on his religious holiday, may all suffer some embarrassment because of their exercise of their constitutionally-protected right of religious nonconformity. But since flag saluting, biology, and general public school studies are all acts of secular conduct on the part of the public school authorities, there is no establishment of religion involved and hence no right to require the school authorities to eliminate the flag salute ceremony, drop the biology course or close the public schools on the Jewish Day of Atonement. Where, however, the conduct complained of is religious — as in the McCollum case and in the Schempp case — there is a constitutional right to a discontinuance of that conduct. This is what Justice Jackson intended — else he would not have concurred in the decision in McCollum but would have vigorously dissented.

54. Id. at 233.
THE SUNDAY LAW CASES

In 1951 the author of this article appealed to the Supreme Court on behalf of two small Orthodox Jewish merchants who had been prosecuted for violating the New York Sunday closing law. The basis of the appeal was that the law violated the establishment clause of the first amendment, infringed upon the defendants' freedom of religion, particularly since their religious conscience compelled them to refrain from business on Saturday, and denied them the equal protection of the laws by reason of lack of any reasonable justification for the classification of businesses permitted or forbidden to operate on Sunday. In Friedman v. New York, it took the Court but one brief sentence to dispose of all the defendants' contentions: "Appeal dismissed for the want of a substantial federal issue." A decade later, during its past term, it took the Court 107 pages of the Supreme Court Reporter to pass upon the same contentions. But the net result was exactly the same: the contentions were overruled and the statutes upheld.

All in all, four cases were before the Court in this term. Two of them, McGowan v. Maryland and Two Guys from Harrison-Allentown, Inc. v. McGinley, concerned owners of highway discount department stores which were open for business seven days a week. The other two, Gallagher v. Crown Kosher Super Market of Massachusetts and Braunfeld v. Brown, concerned stores owned (as in the Friedman case) by Orthodox Jews who abstained from all business activities on Saturdays.

The four cases involved three statutes — those of Maryland, Massachusetts and Pennsylvania. As has been indicated, all the statutes were attacked on three principal grounds: (1) that Sunday laws violate the constitutional prohibition against establishment of religion; (2) that they violate the constitutional protection of religious liberty; and (3) that they deny to the merchants equal protection of the laws in violation of the fourteenth amendment.

The two cases involving the discount houses were decided by a vote of eight to one, with only Justice Douglas voting to declare the statutes unconstitutional as to all parties. In the two cases involving the Jewish Sabbath observers, Justices Brennan and Stewart also dissented and joined Douglas in voting to declare the laws unconstitutional as against the Jewish Sabbath observers.

In all four cases the prevailing opinions were written by Chief Justice
Warren. In meeting the attack based upon the principle of separation of church and state he said that if the present purpose of a Sunday law is to use the state's coercive power to aid religion it would be unconstitutional and in violation of the no establishment clause of the first amendment. He conceded further that this indeed was the original purpose of the three Sunday laws under attack. There was no question, he said, that historically these Sunday laws were enacted during colonial times as religious laws whose purpose was to insure the observance of the Christian Sabbath as a religious obligation. However, he held, the religious origin of these statutes did not require that they be held invalid today, if in fact, the religious purpose was no longer in effect.

This, he said, was the case in respect to these laws. The present purpose of the legislature is to set aside a day not for religious observance, but for rest, relaxation, and family togetherness, and the motivation is therefore secular rather than religious. As evidence to support this conclusion the Chief Justice pointed out, for example, that the Maryland statute permits such Sunday activities as the operation of bathing beaches, amusement parks and even pin ball and slot machines as well as the sale of alcoholic beverages and the performance of professional sports. Such exemptions from the law obviously are directly contrary to the religious purpose of the Sabbath and thus indicate clearly that the present purpose of the statutes is not religious but secular.61

Since these are today welfare or secular statutes, the fact that to a certain extent their operation coincides with religious purposes does not make them religious laws, according to the Chief Justice. In this respect, he referred to the Everson case in which the use of public funds to transport children to parochial schools was upheld. The purpose of that statute, the Chief Justice said, was to protect children from the hazards of traffic and the fact that indirectly the parochial schools benefited thereby did not transform what was basically a secular or welfare law into a prohibited law respecting an establishment of religion. For the same reason, he said, the fact that the Christian religion may benefit by the state's decision to choose Sunday as the day in which people are required to abstain from labor and to rest and relax, does not transform these purely secular and welfare laws into laws prohibited by the first amendment.

With the exception of Justice Douglas, all of the members of the Court also rejected the claim of the two discount houses that the Sunday laws violated their religious liberty. The Chief Justice asserted that the

61. Perhaps it indicates only that Catholic concepts of proper Sabbath observance have displaced those of Puritan Protestantism, as they have done in respect to consumption of intoxicating liquors and are doing in respect to bingo and other forms of gambling. See PFEFFER, CREEDS IN COMPETITION 93-111 (1958).
discount houses could not even raise the issue of religious liberty. They alleged only economic injury, not any infringement of their own religious freedoms due to Sunday closings; in fact, there was nothing in the record to show what their religious beliefs were.

The Court did concede that the Jewish Sabbath observers had standing to assert violation of religious freedom since the operation of the compulsory Sunday law hindered their observance of their own Sabbath by imposing upon them an economic hardship. Nevertheless, six of the nine Justices held that the statutes were constitutional even as against the Jewish merchants.\footnote{62. On this aspect of the case there was no single opinion representing the views of the majority of the Court, since Justices Douglas, Brennan, and Stewart dissented, and Justices Frankfurter and Harlan concurred in a separate opinion written by the former. There is, however, no basic difference between the Chief Justice's opinion and that of Justice Frankfurter.}

The freedom to hold religious beliefs and opinions, the Chief Justice said, is absolute. However, he continued, what was involved in the present cases is not freedom to hold religious beliefs or opinions but freedom to act, and such freedom, even when motivated by religious convictions, is not totally free from legislative restrictions. Thus, for example, the fact that polygamy may be a positive command of the Mormon religion does not prevent the government from declaring it illegal and making its practice criminal.\footnote{63. Reynolds v. United States, 98 U.S. 145 (1878).} Similarly, the Court in the past had upheld a statute making it a crime for a girl under the age of eighteen years to sell newspapers or periodicals in public despite the fact that a child of the Jehovah's Witnesses faith felt that it was her religious duty to perform this work.\footnote{64. Prince v. Massachusetts, 321 U.S. 158 (1944).}

In the present case, Chief Justice Warren asserted that the statutes did not even go as far as those involved in the polygamy and child labor cases, for there they forbade conduct which religion commanded, whereas the Jewish religion does not command engaging in business on Sunday. The restriction on religious freedom is merely indirect and consequential and the Court should not strike down what it found to be a welfare law merely because of this indirect burden on the exercise of religion. "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless a State may accomplish its purpose by means which do not impose such a burden."\footnote{65. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).}
example, the state could enact a law, as many states have done, requiring one day of rest each week for all workers but leaving it up to each employer to decide which day shall be the day of rest. Or the state could, as a number of states do in fact, designate Sunday as the day of rest but provide an exemption for those whose religious convictions compel them to observe a day other than Sunday as their day of rest. The majority of the Court, however, rejected this argument stating that the Court could not adjudge arbitrary and unreasonable the refusal of the states to use this method of achieving their purpose.

The third ground upon which the Sunday law was challenged in all the cases was that the crazy-quilt pattern of exclusions, exceptions, and exemptions in the various statutes bore no semblance of reason and, being arbitrary, constituted denial of due process and of the equal protection of the laws. For example, in Massachusetts it is legal to sell fish and foodstuffs at wholesale but not at retail; to dig for clams but not to dredge oysters. In Pennsylvania it is permissible to fish on Sundays from public waters but not on private property without the consent of the owner. In Maryland merchandise customarily sold at beaches and amusement parks may be sold there on Sundays, but the same articles may not be sold on Sundays in places other than beaches and amusement parks. These and many other illustrations were cited to support the argument that the Sunday laws are completely irrational and act unequally, all of which make them unconstitutional and in violation of the fourteenth amendment.

Justice Douglas did not address himself to this challenge, since he held the statutes unconstitutional on the other grounds. All the other Justices, however, considered the challenge and rejected it. The Chief Justice's majority opinion reflects the almost unbroken practice of the Supreme Court since the Roosevelt court reform campaign in 1937, not to interfere with state social welfare legislation on the ground that it is arbitrary or a deprivation of property without due process of law. Once the Court determined that Sunday laws are not religious laws but social welfare laws, it was almost inevitable that it would not interfere with the legislature's discretion on which practices should be prohibited and permitted in these laws. The Court felt that it could not say without a shadow of doubt that there could be no reason or rationale underlying the inclusions and exclusions of the various statutes.

Justices Brennan and Stewart dissented only in the two Sabbatarian

66. I find it difficult to reconcile Justice Black's concurrence in this aspect of the case with his usual strong rejection of balancing in first amendment cases. See, e.g., his dissent in Wilkinson v. United States, 365 U.S. 399, 415 (1961), in which he wrote that "where these [first amendment] freedoms are left to depend upon a balance to be struck by this Court in each particular case, liberty cannot survive. For under such a rule, there are no constitutional rights that cannot be 'balanced' away." Id. at 423.
cases, and in these only on the ground that the statutes unconstitutionally infringed upon the religious liberty of the Sabbatarians. Acknowledging that the Sunday laws were in fact social welfare statutes, they contended nevertheless, that they unnecessarily infringed upon the constitutional rights of persons who observe a day other than Sunday as their day of rest.

Writing for himself and Justice Stewart, Justice Brennan asserted that "the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals." A statute which infringes upon personal liberty, particularly religious liberty, should be subject to a far more exacting standard than is applied to a law which concerns only economic interests. Religious freedom has classically been one of the highest values of our society. He criticized what he believed was the Court's action in holding that "any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose." The majority's sanctioning of the states' refusal to exempt Sabbatarians merely because enforcement of the law might thereby be rendered somewhat more difficult exalts "administrative convenience to a level high enough to justify making one religion economically disadvantageous."

Justice Douglas dissented in all four cases and asserted that he deemed the statutes unconstitutional both as an establishment of religion and as a prohibition of the free exercise thereof.

Two years after the Court summarily dismissed the Friedman case, I suggested, perhaps rashly, that this was not "the last word on the question." I am prepared to be equally rash today and suggest that the many, many words expended in the four cases before the Court in the past term are also not the last words on the question.

The Court, it should be noted, did not completely close the door to all judicial attacks on Sunday laws. The Chief Justice, speaking for the majority, concluded one of the opinions with the statement:

We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose — evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.

While it is unlikely that the demonstration called for in this quota-

69. Id. at 615-16.
70. PFEFFER, CHURCH, STATE AND FREEDOM 241 (1953).
tion can be made to the Court's satisfaction in the proximate future, nevertheless, the Court has left the door slightly ajar. If as may well be, the Court will at some future time be prepared to invalidate Sunday laws, it may, because of this sentence, be able to do so without repudiating these decisions.

Or the end may come in another way. Undoubtedly, there will be in the near future a spurt of legislative and administrative action to enact new Sunday laws, strengthen those on the books, and institute more vigorous enforcement. (This, in fact, has already begun.) Despite this, the steady and almost uninterrupted trend of Sunday laws becoming dead-letter laws will continue. The Supreme Court decisions may retard somewhat this development but they will not be able to defeat it. The social, cultural, political, and economic development of the American society inevitably leads towards the ultimate discard of compulsory Sunday laws. It may be that the Court will finally dispose of this troublesome issue in the same way that it disposed of Connecticut's anti-birth control law: it may find Sunday laws so dead that a formal death certificate by the Supreme Court will no longer be necessary.

**Religious Test for Public Office**

"The Constitution is a purely secular document." From alpha, the Preamble, to omega, the last operative clause, there is an unmistakable intent to exclude religion. The Preamble sets forth the purposes for which the new government is to be established, and they are all purely secular purposes. God is not invoked in the Preamble nor mentioned in the text of the Constitution. The only reference to religion in the Constitution is found in the omega, and there with a wholly exclusionary intent: "no religious test shall ever be required as a qualification to any office or public trust under the United States." In the last decision of its 1960 Term the Supreme Court for the first time passed upon the applicability of that principle (although not the Constitutional provision itself) to the states.

The case involved a resident of Maryland who had been appointed by the governor to the office of notary public but had been denied his commission because he would not swear or declare his belief in the existence of God, as required by the Maryland constitution. The case almost suffered the same fate as *Doremus v. Board of Education*, being mooted on the eve of decision. During the course of argument for the appellee (the State of Maryland) the state deputy attorney-general disclosed that

---

72. **Beard, The Republic** 165 (1943).

73. Art. VI, cl. 3.


75. 342 U.S. 429 (1952). See text accompanying note 36 *supra*. 
notary commissions in Maryland expire two years after appointment and that the appointment of Roy Torcaso, the appellant, would expire the following week. Nothing in the record gave any intimation of this nor had the point been raised or briefed at any time. 76

Obviously troubled, the Chief Justice requested counsel for both sides to submit by the end of the week briefs limited to the question whether the case had been mooted. Counsel for Torcaso submitted a brief urging that it had not and that Court should retain jurisdiction. Fortunately, perhaps, the Court was not required to pass on the validity of counsel's arguments, for the state's brief informed the Court on behalf of the governor that in order to obtain its decision on the underlying issue Torcaso would be reappointed for an additional two year term.

The governor's statement expressly stated the motivation for the reappointment, and had the Court felt a need to avoid deciding the issue it could have refused to decide the case, without extending unduly the rationale of the birth control case, 77 on the ground that the issue was now feigned and not really adversary. However, the fact that the Court's decision on the merits was unanimous (although Justices Frankfurter and Harlan concurred only in the result) indicates quite clearly that no such need was felt by the Court. In any event, after the state's supplemental brief had been submitted, mootness did not again rear its unwelcome head.

In the McCollum case, Justice Black noted that the judgment appealed from could not stand unless the Court was prepared to overrule its interpretation of the establishment clause expressed in the Everson case, and this the Court was not willing to do. 78 In the present case, it was clear that the judgment appealed from could not stand unless the force of Everson-Mccollum had been vitiated by Zorach. As has been indicated in the first part of this article, the Court was not willing so to hold. The decision invalidating the Maryland oath requirement was the necessary consequence of this refusal.

The Court's opinion ends (except for the sentence decreeing reversal and remand) with the sentence: "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." 79 This means (unless the due process clause of the fourteenth amendment imposes more stringent restraints upon the states than the first does on the federal government, which is hardly likely) that the free exercise clause of the

76. This was also the case in Doremus v. Board of Educ., 342 U.S. 429 (1952).
first amendment encompasses non-belief as well as belief and secures the free exercise of non-religion as well as of religion.80 This need come as no surprise inasmuch as the amendment’s guaranty of freedom of speech encompasses freedom of non-speech81 as well as freedom of non-listening.82

This sentence raises another not insignificant, though still largely inchoate conceptual question, that merits some comment. This concerns the relationship between the establishment and free exercise clauses of the first amendment, and has already in part been considered earlier in this article.83 There are three ways of viewing this relationship: the establishment clause may be considered subsidiary and a means to the free exercise guaranty, or it may be considered independent and of equal weight, or the two may be considered unitary, two sides of the same coin, as it were. The first view, as has been indicated, was rejected by the Court in the first of the Sunday Law Cases by holding that while the appellant could not assert a claim of religious freedom it could assert a claim of infringement of the establishment clause. In so holding the Court adopted the second of these three views. The third view is implicit in Justice Black’s opinion for the Court in the Torcaso case. The quoted last sentence, following as it does an opinion devoted to a discussion of the meaning and applicability of the establishment clause, indicates clearly, if not explicitly, that Justice Black, like Justice Rutledge, considers establishment and free exercise as “correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom.”84

There are practical as well as conceptual consequences to the Torcaso decision. A number of other states in addition to Maryland have constitutional provisions requiring an acknowledgment of a belief in God in order to hold public office,85 and the decision of course nullifies these

80. See PFEFFER, CHURCH, STATE AND FREEDOM 498-99 (1953). But cf. PARSONS, THE FIRST FREEDOM 79 (1948), where it is said: “As for those who profess no religion, or who repudiate religion, it is difficult to conceive how they can appeal to the first amendment, since this document was solely concerned with religion itself, not its denial. By its very nature as regards what it says about religion, they are outside its ken.”
83. See text accompanying notes 24-27 supra.
85. ARK. CONST. art. 19, § 1; PA. CONST. art. 1, § 4; TENN. CONST. art. 9, § 2.
as well. It should — although it won't — lead to the amendment of the many statutes, state and federal, which contain the phrase "so help me God" in various prescribed oaths (although, of course, it would not affect the right of any person to add the phrase if he wished). Finally, it implicitly but necessarily invalidates any vestiges of statutory or judicial procedure that disqualifies or permits the impeachment of witnesses on grounds of religious disbelief.