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THE SUPREME COURT AND THE RELATIONSHIP BETWEEN THE "ESTABLISHMENT" AND "FREE EXERCISE" CLAUSES

*John Norton Moore**

I. INTRODUCTION

The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] Although the "free exercise" and "establishment" clauses of the first amendment are largely interrelated, until recent years the nature of that relationship had remained virtually unexplored. This was due in large part to the relative infrequency of decisions arising under the establishment clause. In recent years, however, judicial attention has been increasingly directed toward interpretation of the establishment clause, and the resulting more frequent decisions have provided some additional hints as to the proper relationship between the two clauses.

Prior to the October term, 1960, the Supreme Court had construed the establishment clause in only eight cases,[2] and arguably, three of these cases did not really raise the establishment issue.[3] During the past several years, however, the Court has frequently decided important cases

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[1] U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Ibid.*

[2] Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Selective Draft Law Cases, 245 U.S. 366 (1918); Quick Bear v. Leupp, 210 U.S. 50 (1908); Bradfield v. Roberts, 175 U.S. 291 (1899). Arguably Fowler v. Rhode Island, 345 U.S. 67 (1953) should be added to this list. Although *Fowler* is primarily a "free exercise" case, the ordinance involved was discriminatory in its application and thus preferred one religion over another.

[3] Cantwell v. Connecticut, 310 U.S. 296 (1940) (primarily a "free exercise" case); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (decided before the "establishment clause," as such, was applicable to the states); Quick Bear v. Leupp, 210 U.S. 50 (1908) (private transaction). Mr. Justice Brennan would add Bradfield v. Roberts, *supra* note 2 to this list.

squarely construing this clause,[4] the latest of which were decided on June 17, 1963.[5]

The first of these recent establishment cases to be decided was a group of four cases which will be referred to in this article as the *Sunday Closing Law Cases*.[6] In these cases, decided during the October term, 1960, the Court held that the Sunday closing laws of Maryland, Massachusetts, and Pennsylvania did not violate the establishment clause.[7]

In *Torasco v. Watkins*,[8] another establishment case decided during the October term, 1960, the Court held that Maryland's requirement of a declaration of belief in the existence of God as a prerequisite for state office was an abridgment of the guarantees of religious freedom of the first amendment and was thus unconstitutional.[9]

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[4] Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); Commonwealth v. Arlan's Dept. Store, Inc., 357 S.W.2d 708 (Ky. Ct. App. 1962), *appeal dismissed*, 371 U.S. 218 (1962) (appeal dismissed for want of a substantial federal question); General Fin. Corp. v. Archetto, 176 A.2d 73 (R.I. Sup. Ct. 1961), *appeal dismissed*, 369 U.S. 423 (1962) (appeal dismissed for want of a substantial federal question); The Sunday Closing Law Cases—(Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961)).

[5] Sherbert v. Verner, 374 U.S. 398 (1963); School Dist. v. Schempp, 374 U.S. 203 (1963) (decided jointly with *Murray v. Gurlett*). In this paper the *School Dist.* and *Murray* cases will be jointly referred to as the *Bible Reading Cases*. See also Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1962).

[6] Gallagher v. Crown Kosher Super Mkt., Inc. 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); see Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961); 23 U. PITT. L. REV. 222 (1961).

[7] McGowan v. Maryland, 366 U.S. 420, 429-53 (1961) (Maryland); Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617, 624-31 (1961) (Massachusetts); Braunfeld v. Brown, 366 U.S. 599, 601 (1961) (Pennsylvania); Two Guys, Inc. v. McGinley, 366 U.S. 582, 592-98 (1961) (Pennsylvania). Mr. Justice Frankfurter concurred in an opinion joined by Mr. Justice Harlan in McGowan v. Maryland, *supra* at 459. Mr. Justice Douglas dissented. *Id.* at 561. The court reasoned that these closing laws were primarily secular measures intended to provide a uniform day of rest.

"After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation." *Id.* at 449. "Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion." *Id.* at 452; see cases cited *supra*.

[8] 367 U.S. 488 (1961).

[9] Article 37 of the Declaration of Rights of the Maryland Constitution provided: [N]o

The next establishment decision, *Engel v. Vitale*,[10] was decided during the October term, 1961. In *Engel*, the so-called "prayer reading" case, the Court held that the official recitation of the state written Regents' prayer in the New York public schools was a violation of the establishment clause.[11]

Another recent establishment decision in the Supreme Court, although only a memorandum opinion, was *Commonwealth v. Arlan's Dept.*

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religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . ." Actually, the Court did not specifically place the decision on either the "establishment" or "free exercise" clause. The language of the Court was: "This Maryland religious test for public office unconstitutionally *invades the appellant's freedom of belief and religion* and therefore cannot be enforced against him." *Id.* at 496. (Emphasis added.)

[10] 370 U.S. 421 (1962); see Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962).

[11] This decision resulted in a storm of controversy, largely overshadowing even the momentous reapportionment decision of Baker v. Carr, 369 U.S. 186 (1962). Immediately following the "prayer reading" case, headlines proclaimed that the Supreme Court had declared prayer unconstitutional. Soon cars sported election stickers urging the Court to put God back in the schools, and there was much talk of constitutional amendment. See Sutherland, *supra* note 10, at 50 n.76. See also The Silent Prayer Plan, The New York Times, Oct. 1, 1962, p. M29, Col. 5. This was dramatic proof that almost no question in American political life is more controversial than separation of church and state. Witness for example the large number of news articles on this subject appearing in popular magazines. For several such articles see *Has The Supreme Court Outlawed Religious Observance in the Schools?* Reader's Digest, Oct. 1962, p. 78, and *Latest in the Fight over Federal Aid to Schools*, U.S. News & World Report, Dec. 25, 1961, p. 67. See also Heule, *American Principles and Religious Schools*, 3 ST. LOUIS U.L.J. 237 (1955). "A dangerous business this; for a mistaken decision in one direction may set a precedent and start an attitude of mind which would eventually endanger all our freedom; a mistaken decision in the other direction may leave us defenseless against our mortal enemies. Obviously, such delicate decisions cannot be made in an atmosphere charged with emotion." *Id.* at 238. "The Supreme Court has been deluged with letters on the case [*Engel v. Vitale*, the New York prayer case] all of them urging the court to permit the prayer." N.Y. Times, April 4, 1962, p. 45, col. 1. In fact, Mr. Justice Clark, who voted with the majority in *Engel*, even made an unprecedented speech giving his views on the holding in the case, which at least implied that the decision should be strictly interpreted on its facts. See N.Y. Times, Sept. 24, 1962, p. 50M, col. 4; The Miami Herald, Aug. 5, 1962, p. 12A, col. 1. There was no general agreement, however, as to just what the decision actually held. On the one hand, there were those who advocated that the decision properly construed should be confined to its facts, and thus that it declared nothing more unconstitutional than the official use of a state written prayer. On the other hand, some construed the decision to the extreme of precluding even the use of Christmas trees in the public schools. "Christmas trees were banned at three public schools in this southeastern Massachusetts community [Sharon, Massachusetts] today by principals who were fearful they violated laws governing separation of church and state." The Washington Post, Dec. 15, 1962, p. A2, col's 5–6.

Store, Inc.[12] In that decision, a challenge was made under the establishment clause to the constitutionality of the Kentucky "blue laws," which, unlike those challenged in the *Sunday Closing Law Cases*, contain exemptions from the requirements of the Sunday closing laws for those who observe a sabbath other than Sunday.[13] The Kentucky Court of Appeals upheld the "blue laws," and the Supreme Court dismissed the challenge with the order that no substantial federal question was presented. This case squarely presented the Court with a problem of the proper relationship between the free exercise and establishment clauses. The very exemptions challenged under the establishment clause were designed to protect the free exercise of religion. Thus, to declare the exemptions unconstitutional under the establishment clause would result in an apparent conflict with the free exercise principle.

The latest establishment decisions, decided on June 17, 1963, go far toward reconciling this apparent conflict. In *Sherbert v. Verner*,[14] the Court held that a Seventh-Day Adventist could not be disqualified from receiving unemployment benefits under the South Carolina Unemployment Compensation Act simply because religious scruples prevented her from working on Saturday. Although the case was primarily a free exercise decision, the Court construed the establishment clause to refute the argument that an exemption for Seventh-Day Adventists required by the free exercise clause would itself be an establishment of religion. Thus, as an establishment case, *Sherbert v. Verner* is significant in that it makes clear that exemptions solely on the basis of religion are not necessarily establishments of religion if they are designed to protect the free exercise of religion. Moreover, and perhaps of even more importance, as a free exercise case the *Sherbert* case demonstrates the great weight of the free exercise clause when balanced against an alleged secular purpose. As such, it could have a great impact on future welfare legislation. In the *Bible Reading Cases*,[15] *School Dist. v. Schempp* and *Murray v. Curlett* decided jointly, the Court held that a Pennsylvania law requiring the daily reading in the public schools of at least ten verses from the *Bible*, and Maryland's law authorizing the official daily reading in the schools

[12] 357 S.W.2d 708 (Ky. Ct. App. 1962), *appeal dismissed*, 371 U.S. 218 (1962) (appeal dismissed for want of a substantial federal question).

[13] "Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty prescribed . . . if they observe as a Sabbath one day in each seven." Arlan's Dept. Store, Inc. v. Kentucky, 371 U.S. 218, 219 n.1 (1962).

[14] 374 U.S. 398 (1963).

[15] School Dist. v. Schempp, 374 U.S. 203 (1963).

of the Lord's Prayer and one chapter of the *Bible*, were unconstitutional establishments of religion. In several different opinions, the Court made the most comprehensive analysis of the religion clauses to date, stressing that some religious accommodations are permissible, again particularly those designed to protect the free exercise of religion.[16] It was clear that following the June 17 decisions the Court had for the first time significantly grappled with the relationship between the free exercise and establishment clauses.

This paper, by examining the establishment cases,[17] will attempt to discern some aspects of this relationship and to show that in many situations the establishment and free exercise clauses are inseparable and should be construed together.[18] The paper will briefly analyze the situations in which constitutional questions may arise under each of the clauses, explore the similarities of the two clauses under the secular purpose test, and examine several situations in which there is an apparent conflict between the two clauses.

II. "ESTABLISHMENT" AND "FREE EXERCISE" DISTINGUISHED

Although the first amendment speaks almost in the same breath of "no law respecting an establishment of religion . . ." and no law "prohibiting

[16] Although the public reaction to the *Bible Reading Cases* was immediate and heated, it did not reach the intensity of controversy following the *School Prayer Case* decided only a short year before. During that year, it was apparent that the Supreme Court, though still under heavy attack, had won large segments of the public to its views, or at least that groups favoring its religion stand had become more vocal.

Once again, constitutional amendments were introduced almost immediately to restore the prayer custom in the schools. Christian Science Monitor, June 21, 1963, p. 1, col. 1 (West. ed.). See generally N.Y. Times, June 18, 1963, p. 1, col. 5 (West. ed.); San Francisco Examiner, June 18, 1963, p. 1, col. 3; Lewis, *Public Mood Plays Big Role in Court Rulings*, N.Y. Times, June 24, 1963, p. 16, col. 1 (West. ed.); N.Y. Times, June 28, 1963, p. 16, col. 8 (West. ed.).

[17] Although this paper primarily examines the establishment cases, one should also keep aware of their free exercise background. See Torcaso v. Watkins, 367 U.S. 488 (1961); Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953); United States v. Ballard, 322 U.S. 78 (1944); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 319 U.S. 103 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1879).

[18] For an excellent discussion of the "religious freedom" clauses of the first amendment see Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

the free exercise thereof . . . ."[19] to some extent, these clauses have been interpreted as setting forth separate constitutional requirements. This distinction is of more than academic importance.

One of the most difficult problems in religious freedom cases is that of standing to challenge the constitutionality of the enactment.[20] For this purpose, it has been held to make a very real difference whether the issue is one of free exercise or of establishment. For example, in the recent *McGowan v. Maryland* and *Two Guys v. McGinley* cases, two of the *Sunday Closing Law Cases*, the Court held that, on the same facts, the appellants had standing on the establishment issue but not on the free exercise issue. In the context of these cases and without information regarding appellants' religious beliefs, economic injury would suffice for establishment but not free exercise standing.[21] The court said:

> If the purpose of the 'establishment' clause was only to insure protection for the 'free exercise' of religion, then what we have said above concerning appellant's standing to raise the 'free exercise' contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority. . . . We find that, in these circumstances, these appellants have standing to complain that the statutes are laws respecting an establishment of religion.[22]

There is some question whether this language may be reconciled with the seemingly restrictive approach taken by the Court in 1952 toward es-

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[19] See note 1 *supra*.

[20] See the *Sunday Closing Law Cases* note 4 *supra*; Doremus v. Board of Educ., 342 U.S. 429 (1952) (held no "standing" in "Bible reading" case). See also Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928) (*Frothingham* dismissal of "establishment" attack on the chaplains of the Senate, House of Representatives, army and navy). See generally authorities cited note 24 *infra*.

[21] "The Court refused to listen to appellant's contention that the statute unreasonably interfered with the free exercise of religion because appellants had alleged only economic loss in the lower court. . . . [I]n *Everson*, a district taxpayer was permitted to challenge, on 'establishment' grounds, a state statute which authorized district boards of education to reimburse parents for fares paid for the transportation of their children to both public and Catholic schools." 23 U. PITT. L. REV. 222 n.1 (1961).

In footnotes to the *McGowan* and *Two Guys* cases, Mr. Justice Black indicates that he feels that the appellants do have standing to raise the "free exercise" contention. Two Guys, Inc. v. McGinley, 366 U.S. 582, 592 n.10 (1961); McGowan v. Maryland, 366 U.S. 420, 429 n.6 (1961).

[22] *Id.* at 430–31. That the requirements are different for free exercise and establishment standing was again reaffirmed in footuote nine of the court's opinion in the *Bible Reading Cases*.

tablishment standing in *Doremus v. Board of Educ.*[23] In any event the distinction may be of practical importance for standing in some cases, even if it is questionable as applied in the *McGowan* and *Two Guys* cases. For in such a situation, if economic injury will suffice for establishment standing, surely it should suffice for standing under the free exercise clause which is arguably the more sensitive of the two clauses under the secular purpose test. Moreover, it is clear from the other two *Sunday Closing Law Cases*, *Braunfeld* and *Gallagher*, and the recently decided *Sherbert* case, that indirect economic injury can be a basis for free exercise as well as establishment standing.

At least one writer suggests that *Engel v. Vitale* takes standing in religious establishment cases even further by allowing standing based neither on compulsion nor identifiable economic injury.[24] To whatever extent this may be true, it should be remembered that even though *Engel* was primarily based on an establishment rationale, it involved a situation replete with possibilities of indirect compulsion resulting from governmental action on the basis of religion. In addition, establishment cases are by nature cases in which it is difficult to show immediate personal injury since the usual establishment case involves aid to religion rather than coercion against personal religious practices. Consequently, perhaps the principal factor in establishment standing should simply be the magnitude of the potential harm of the practice challenged. Since the constitutional questions of religious freedom are largely balancing questions, such a rationale, which need not be enunciated, could easily be the basis for allowing establishment standing in the important school room situations while denying establishment standing in the not so important situations, such as the opening of Congress with a prayer.

Free exercise standing, on the other hand, depends on a showing of coercion against personal religious practices; it should, therefore, be granted freely whenever an individual's particular religious freedoms are infringed by governmental compulsion, direct or indirect. In any event, the problem of standing to sue may be one of the most important future problems under the religious freedom clauses.

Another obvious importance of the distinction between the free exercise and establishment clauses is that if the two clauses do set forth separate constitutional requirements, then a law may be unconstitutional

[23] 342 U.S. 429 (1952) (Justices Douglas, Reed and Burton dissented, urging that standing to raise the "establishment" issue was present).

[24] Sutherland, *supra* note 10, at 35; see Comment, 63 COLUM. L. REV. 73, 94 n.153 (1963). See also Kurland, *supra* note 18, at 17–22.

under the requirements of either. An excellent illustration of this may be seen in the opinion of Mr. Justice Brennan in two of the *Sunday Closing Law Cases*, *Braunfeld v. Brown*[25] and *Gallagher v. Crown Kosher Super Mkt.*[26] Each of these cases involved issues both of free exercise and establishment. The Court held on the establishment issues that the Sunday closing laws were constitutional. Mr. Justice Brennan, and arguably Mr. Justice Stewart, concurred as to the establishment issue, but dissented on the free exercise question, urging that the closing laws deprived appellants of the free exercise of religion and were thus unconstitutional.[27] Thus, Mr. Justice Brennan's opinion neatly demonstrated that the establishment-free exercise distinction can produce substantial differences in result.[28]

It is one thing to recognize that this distinction has been made and has importance, and quite another to formulate clear standards by which to categorize the cases as either free exercise or establishment. As. Mr. Justice Frankfurter said, concurring in the *Sunday Closing Law Cases*,

> Within the discriminating phraseology of the First Amendment, distinction has been drawn between cases raising 'establishment' and 'free exercise' questions. Any attempt to formulate a bright-line distinction is bound to founder.[29]

Consequently, the discussion which follows will not attempt to draw a "bright-line" distinction. It is possible and helpful, however, to isolate the principal emphasis in the establishment cases. The discussion which follows will attempt to demonstrate generally the type of situation in which the establishment question is pertinent in order to distinguish it from the

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[25] 366 U.S. 599 (1961).

[26] 366 U.S. 617 (1961).

[27] "I [Mr. Justice Brennan] agree with The Chief Justice that there is no merit in appellant's establishment and equal-protection claims. I dissent, however, as to the claim that Pennsylvania has prohibited the free exercise of appellants' religion." Mr. Justice Brennan's concurring and dissenting opinion in Braunfeld v. Brown, 366 U.S. 599, at 610 (1961). Mr. Justice Stewart dissenting in *Braunfeld* said: "I agree with substantially all that Mr. Justice Brennan has written." *Id.* at 616. Justices Brennan and Stewart dissented for the same reason in Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617, at 642 (1961).

[28] It could be argued that Mr. Justice Brennan's distinction here was more one of terminology than of fact. His dissent, however, focused on the laws disfavoring of religion rather than on its favoring or aiding of religion. "In other words, the issue in this case . . . is whether a State may put an individual to a choice between his business and his religion." Braunfeld v. Brown, 366 U.S. 599, 611 (1961) (dissenting opinion of Mr. Justice Brennan).

[29] McGowan v. Maryland, 366 U.S. 420, at 463 (1961).

free exercise question. This discussion will show that the establishment and free exercise clauses are not totally independent, but are largely overlapping with respect to the types of situations in which each is raised.

Broadly speaking, a law respecting an establishment of religion is a civil regulation either favoring or disfavoring religion.[30] It is true that the term "respecting" in the establishment clause is a neutral term and thus encompasses laws disfavoring as well as favoring religion,[31] but the primary element in the usual establishment case is that of favoring religion.[32] For example, all of the establishment cases decided by the Court to date have involved some form of aid to religion other than merely incidental aid resulting from disfavoring another religion.[33] This is not

[30] With the growth in the meaning of religion as used in the establishment cases, aiding and preferring are almost indistinguishable. See Torcaso v. Watkins, 367 U.S. 488 (1961), for such an approach to the meaning of religion. Thus favoring is used here to include *aiding* as well as *preferring*. "In the *McCollum* case this line of argument was severely challenged by appellee. Assembling all the available historical data, he argued that the clause in question natively and origiually forbade only laws 'respecting' (*i.e.*, favoring or disfavoring) 'an establishment of' (*i.e.*, preferential status in law for) 'religion' (*i.e.*, the doctrines, practices, or modes of worship of a particular religious group)." Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 25 (1949).

[31] "The point turns on the siguificance to be attached to the word 'respecting,' a two-edged word, which bans any law *disfavoring* as well as any law *favoring* an establishment of religion." Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 12 (1949).

[32] In discussing the purpose of the "establishment" clause, Mr. Justice Frankfurter concurring in *McGowan* emphasizes the support aspect of it. "Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a state may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the state is served, or because a majority of its citizens, holding that belief, are offended when all do not hold it." McGowan v. Maryland, 366 U.S. 420, 466 (1961).

[33] Sherbert v. Verner, 374 U.S. 398 (1963) (aided religion by exemptions from strict requirements of unemployment compensation act); School Dist. v. Schempp, 374 U.S. 203 (1963) (aided religion by organized Bible reading and recitation of the Lord's Prayer); Engel v. Vitale, 370 U.S. 421 (1962) (aided religions believing in God by "prayer reading"); Torcaso v. Watkins, 367 U.S. 488 (1961) (aided those religions believing in God by an oath requirement), Sunday Closing Law Cases, 366 U.S. 617, 599, 582, 420 (1961) (established Sunday as day of rest, thus aiding those religions observing Sunday); Zorach v. Clauson, 343 U.S. 306 (1952) (lent compulsory school powers to religious training); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (lent state power and building for religious training); Everson v. Board of Educ., 330 U.S. 1 (1947) (gave fare to those attending parochial schools); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (gave school books to parochial schools); Selective Draft Law Cases, 245 U.S. 366 (1918) (exemptions for ministers and theological students); Quick Bear v. Leupp, 210 U.S. 50 (1908) (funds for tuition to parochial schools); Bradfield v. Boberts, 175 U.S. 291 (1899) (building funds to Cath-

to say that a law outlawing all religions would not be an establishment of religion under the neutral terminology of the establishment clause. Nor should this imply that a law outlawing a particular religion would not be an establishment of religion without even considering the incidental aid to other religions resulting from this disfavoring. In fact, perhaps in future cases the negative aspects of the establishment clause will be extended to situations even beyond these.[34] However, at present most laws disfavoring religion in situations less sweeping than these would probably be dealt with solely as free exercise cases, for the free exercise clause is primarily concerned with a "disfavoring" or prohibition of religion.[35] Consequently, the free exercise clause is the most pertinent clause with which to deal with most attacks on laws having primarily prohibitory or negative effects on religious practices. Furthermore, although it is generally true that the establishment clause is interpreted as primarily concerning laws favoring religion, in the usual establishment case this favoring is more than the mere incidental support derived from disfavoring other religions. This latter distinction is really one of what the primary or direct effect of the law is on religion.[36] Of course, terms such as "primary" and "direct" are nebulous ones, and as could be expected, there is really no sharp distinction. Mr. Justice Frankfurter pointed this out in his concurring opinion in *McGowan* when he said: "In view of the competition among religious creeds, whatever 'establishes' one sect disadvantages another, and vice versa."[37] Thus even though a case is primarily an establishment or free exercise case the sister issue may also be raised.

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olic hospital); Commonwealth v. Arlan's Dept. Store, Inc., 357 S.W.2d 708 (Ky. Ct. App. 1962), *appeal dismissed*, 371 U.S. 218 (1962) (appeal dismissed for want of a substantial federal question) (aided organized religions observing a sabbath other than Sunday, by Sunday Closing Law exemptions); General Fin. Corp. v. Archetto, 176 A.2d 73 (R.I. Sup. Ct. 1961), *appeal dismissed*, 369 U.S. 423 (1962) (appeal dismissed for want of a substantial federal question) (aided religion by providing tax exemptions). If, however, *Cantwell* and *Fowler* are considered "establishment" cases, they primarily involve laws disfavoring religion. Fowler v. Rhode Island, 345 U.S. 67 (1953) (ordinance banning some church services as applied); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute regulating religious solicitation). These two cases, however, point up that the "free exercise" clause is chiefly concerned with such disfavoring of religion.

[34] Logically, there is no reason why the establishment clause could not be argued in most free exercise cases under a theory of disfavoring religion.

[35] See cases cited note 17 *supra*.

[36] For example, in Reynolds v. United States, 98 U.S. 145 (1879), the bigamy laws "primarily" impaired the exercise of the Mormon beliefs. However, these bigamy laws also aided other religions both directly by legislating the tenets of their faith (*i.e.* monogamy) and indirectly by eliminating some competition by disfavoring the Mormon Church.

[37] McGowan v. Maryland, 366 U.S. 420, 463 (1961).

For example, in *Reynolds v. United States*,[38] one of the earliest Supreme Court cases arising under the religious freedom clauses, a Mormon whose religious beliefs included polygamy was prosecuted and convicted of bigamy. The Supreme Court upheld his conviction despite his contention that the bigamy law as applied to him prohibited his free exercise of religion. The establishment issue, however, was not raised. Since the bigamy law was a general criminal sanction not primarily aiding religion, but instead having a direct prohibitive effect on the exercise of religion, it concerned the free exercise but not the establishment protections of the first amendment. It could, of course, be argued that bigamy laws do really aid those religions whose tenets include monogamous marriage, but this incidental aid is no more aid to those religions than a general prohibition on murder enacted into the criminal code.[39] Thus, it could be argued that this aid is so tenuous as not to be aid at all in a constitutional sense. Clearly the primary effect on religion of these laws, if any at all, is to prohibit the religious practices of certain sects, and not to aid any religion.

At the other extreme from the *Reynolds* case, and note that the extremes are not easily distinguishable, is a situation such as that in *Everson v. Board of Educ.*[40] In that case, a law providing public funds for transportation of children to public and parochial schools was challenged as a "law respecting an establishment of religion."[41] The primary effect on religion of such a law, if any, was simply to aid parochial schools, and thus to favor the Roman Catholic religion. If such a law involves any prohibition on the exercise of religion, it is only very minor and indirect. For instance, it could be argued that in this case spending the taxpayer's money for aid to religion not necessarily of the taxpayer's own choosing indirectly deprives the taxpayer of his freedom to spend this money to aid the religion of his choice or simply to spend it for some non-religious purpose. In this situation, however, it is plain that the primary effect on

[38] 98 U.S. 145 (1879).

[39] See the general analysis of this problem at note 36 *supra*.

[40] 330 U.S. 1 (1947).

[41] New Jersey had a statute authorizing its local school districts to make rules and contracts for transportation of school children to and from school. Pursuant to this statute a township board of education authorized reimbursement to parents of money expended by them for bus transportation of their children on regular buses operated by the public transportation system. Part of this money went to pay transportation of children attending Catholic parochial schools. See statement of the facts in Everson v. Board of Educ., 330 U.S. 1, 3 (1947).

religion of this law, if any, is aid to religion, and thus the case would ordinarily be thought of as an establishment case.

Between the extremes of the *Reynolds* and *Everson* situations, there are many cases which do not fall neatly into one or the other category. For example, the *Sunday Closing Law Cases* have substantial effects both in support of religion and in prohibition of the exercise of religion. Sunday closing laws not ouly establish Sunday as an allegedly religious holiday, but they also inhibit, at least indirectly, the free exercise of religion of those who do not happen to observe Sunday as the sabbath. Similarly, the *Torcaso* case involves a situation both aiding religion and prohibiting free exercise of non-believers.[42] By requiring an oath of belief in God as a prerequisite for public office, those religions whose adherents believe in God are aided; and by denying public office to those not believing in God, the nonbelievers are indirectly deprived of free exercise of religion. As might be expected, these cases discussed both the establishment and free exercise issues.

As a further illustration of the emphasis in the establishment situation, let us analyze several hypothetical cases. In the first, let us suppose that a city water supply has been fluoridated by majority vote, and that this law is subsequently attacked as contrary to the first amendment.[43] Since support of fluoridation is not a basic tenet of any religion this law does not favor religion, and thus can hardly be said to raise the establishment issue. On the other hand, there may be religious groups that oppose on religious grounds the drinking of fluoridated water,[44] and as to these groups, the law may prohibit the exercise of religion. Consequently, the fluoridation order raises a question of free exercise of religion if it raises

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[42] Religion within the meaning of the first amendment now clearly includes sects which do not believe in God. See Torcaso v. Watkins, 367 U.S. 488, 495 & n.11 (1961). Furthermore, it includes nonbelievers as well. *Id.* at 495. "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief." McGowan v. Maryland, 366 U.S. 420, 465–66 (1961) (concurring opinion of Mr. Justice Frankfurter). "[A]ll discussions of the First Amendment are tormented by the fact that the term 'freedom of religion' must be used to cover 'freedom of nonreligion' as well." Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROB. 61, 71 (1949).

[43] See De Aryan v. Butler, 119 Cal. App. 2d 674, 260 P.2d 98 (1953); Kraus v. City of Cleveland, 116 N.E.2d 779 (Ohio C.P. 1953), *aff'd*, 121 N.E.2d 311 (Ohio App. 1954); Note, *Constitutional Law—Religious Liberty—Fluoridation of Municipal Water Supply*, 3 ST. LOUIS U.L.J. 284 (1955).

[44] Arguably fluoridation is a medication and would be contrary to the beliefs of the Christian Scientists. See generally 3 ST. LOUIS U.L.J. 284 (1955).

any religious freedom questions at all. Thus, where a particular law has no direct effect favoring religion, the establishment issue is usually not discussed.

In another and more difficult hypothetical case, let us assume that a state has enacted a law making the use of contraceptives within its borders a criminal offense,[45] and that this law is subsequently attacked as contrary to the first amendment. Since the Roman Catholic Church opposes the use of contraceptives on religious grounds, this law may be said to aid religion, although perhaps not in a constitutional sense. On the other hand, if there are no religions whose tenets require the use of contraceptives, this law will have no effect which prohibits the exercise of religion, and if any religious freedom issue is involved at all in this situation, it will be the establishment and not the free exercise issue. This is not to say that a religious freedom issue is involved in this situation; in fact there seems to be much evidence to the contrary. But if one were involved, it would be the establishment and not the free exercise issue.

Although this analysis of these hypothetical cases is an oversimplification, it nevertheless demonstrates the distinction in emphasis between the free exercise and establishment cases. This is not a "bright-line" distinction. It is merely one of degree. Establishment and free exercise questions are largely inseparable.

III. THE "ESTABLISHMENT" CLAUSE IN THE SUPREME COURT

Webster defines one meaning of "establish" as: "to make a national or state institution of (a church)."[46] From the earliest days, it has been assumed that the establishment clause was meant at least to prohibit this type of state church.[47] However, it has not always been clear that the

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[45] See Poe v. Ullman, 367 U.S. 497 (1961), which involved an attack on the Connecticut prohibition as a violation of due process. The "establishment" issue was not raised.

[46] WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 778 (1961). "Established church n: a church that is recognized by law as the official church of a nation, that is supported by civil authority, and that receives in most instances financial support from the government through some system of taxation—called also *state church* <the Church of England is the *established* church in England>" *Ibid.* "Establish—(4) To found, recognize, confirm, or admit; as: 'Congress shall make no law respecting an establishment of religion'." BLACK, LAW DICTIONARY 642–43 (4th ed. 1951).

[47] "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others . . . ." COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 224–25 (3d ed. 1898). See generally CORWIN, THE CONSTITUTION OF THE UNITED STATES 757–64 (1953). "Of course, the immediate object of the First Amendment's prohibition was the established church as it had been known in England and in most of the Colonies."

clause intended anything more than this.[48] Although the statements of both Madison and Jefferson have been widely quoted to show that the intention of the framers of the first amendment was either this or something more,[49] "like the other great clauses of the Constitution, the religion clauses cannot now be confined to the application they might have received in 1789."[50] It is the interpretation of the Court which has shaped the clauses.

In the course of that interpretation, various mechanical tests for determining constitutionality under the establishment clause have been enunciated, such as no governmental aid to religion, no preference among religions, or no laws affecting religious *institutions*. Such tests, however necessary, have provided but scant guidelines for decision. Moreover, little has been written with respect to the vital relationship between the establishment and free exercise clauses. Although it is clear today that the establishment clause reaches far beyond the simple state church situation, just how far is still uncertain.

The earliest case which might be considered to have arisen under the establishment clause was that of *Bradfield v. Roberts*[51] in 1899. Congress appropriated 30,000 dollars to be used in building two isolation buildings on the grounds of a hospital in the District of Columbia. The hospital was allegedly operated by a sisterhood of the Roman Catholic Church. It was

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McGowan v. Maryland, 366 U.S. 420, 465 (1961) (Mr. Justice Frankfurter concurring).

[48] "Storey contended, the no establishment clause, while it inhibited Congress from giving preference to any denomination of the Christian faith, was not intended to withdraw the Christian religion as a whole from the protection of Congress." *Id.* at 758–59. "The historical record shows beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of *preference*; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase. Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to remake it." Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3, 20 (1949). See also Mr. Justice Reed's dissent in Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 238 (1948).

[49] See the opinions in the *Sunday Closing Law Cases*, note 4 *supra*, and in Everson v. Board of Education, 330 U.S. 1 (1947). See also Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949); Murray, *Law or Prepossessions?* 14 LAW & CONTEMP. PROB. 23 (1949).

[50] Kurland, *Of Church and State and The Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961). In the recent *Bible Reading Cases*, the Court pointed out the futility of continued attacks on the present interpretation of the establishment clause through historical analysis. 374 U.S. 203, 218 (1963).

[51] 175 U.S. 291 (1899). Mr. Justice Brennan would deny that *Bradfield* raised or decided any first amendment issues. See 374 U.S. 203, 246 (1963).

argued that such an appropriation to a religious society would violate the "constitutional provision which forbids Congress from passing any law respecting an establishment of religion."[52] Mr. Justice Peckham, speaking for a unanimous Court, said that the hospital had been incorporated as a secular corporation by an act of Congress and thus could not be regarded as a religious or sectarian institution. Furthermore, he pointed out that the right reserved in the corporate charter to alter or repeal the act gave Congress full power to remedy any abuses which might develop.[53] Consequently, he said, the law was not a "law respecting an establishment of religion."

Although this case largely ignores the incidental aid rendered to the Roman Catholic sisterhood in this situation, the Court seems to assume the validity of the contention that the establishment clause does something more than merely prohibit a state church or prevent preferential treatment for one religion. Neither a state church nor preferential treatment was directly involved in the case. There was therefore little reason for the Court to have carefully constructed the rather tenuous argument that the funds did not affect religion since the corporation was a civil one, unless it felt that the establishment clause also prohibited laws affecting religious *institutions*. Although the Court did not discuss it, it seems clear that the appropriation was essentially a secular measure designed to achieve greater hospital protection for persons in the District of Columbia. Any effect on religion was purely incidental. Furthermore, it was fairly clear that any effect on religion was quite insubstantial. Hinting at this, the Court said: "It must . . . [the hospital] be managed pursuant to the law of its being [corporate charter]."[54] Apparently, the possibility that the

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[52] *Id.* at 295.

[53] "The right reserved in the third section of the charter to amend, alter or repeal the act leaves full power in Congress to remedy any abuse of the charter privileges." *Id.* at 300.

[54] "Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body." Bradfield v. Roberts, 175 U.S. 291, 298 (1899). Mr. Justice Rutledge dissenting in *Everson* speaks of the *Bradfield* case as "an instance of highly artificial grounding to support a decision sustaining an appropriation for the care of indigent patients pursuant to a contract with a private hospital." Everson v. Board of Educ., 330 U.S. 1, 43 n.35 (1947).

Congressional enactment incorporating a Roman Catholic operation was itself a "law respecting an establishment of religion" was never considered.

In a somewhat similar situation, the Supreme Court recently refused to review the Kentucky Court of Appeals decision in *Abernathy v. City of Irvine*,[55] upholding the constitutionality of a one dollar per year lease to a Roman Catholic order of a hospital built with federal and local tax funds. Mr. Justice Douglas, however, was of the opinion that certiorari should be granted.[56]

In both these cases it could be argued that to disqualify religious organizations from competing for government contracts or receiving government services *simply because they are religious organizations* would interfere with the free exercise of religion. Certainly, the establishment clause should not be interpreted to require such interference.

The next case before the Court which might be considered as raising the establishment question was that of *Quick Bear v. Leupp*[57] in 1908. In this case an injunction was sought against the Commissioner of Indian Affairs to prohibit the expenditure of Indian "treaty funds" as tuition payments for Indians attending Catholic mission schools. The injunction was sought among other grounds on the theory that the expenditure would be an unconstitutional establishment of religion.[58] The Court held, however, that the expenditure of Indian "treaty funds" was an expenditure of the Indians' own money and as a result, was allowable. To hold otherwise, the Court said, would prohibit the free exercise of religion among the Indians. In the language of Mr. Chief Justice Fuller:

> [I] seems inconceivable that Congress should have intended to prohibit them [the Indians] from receiving religious education at their own cost if they so desired it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians. . . .[59]

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[55] 355 S.W.2d 159 (Ky. Ct. App.), *cert. denied*, 371 U.S. 831 (1962) (Mr. Justice Douglas was of the opinion that certiorari should be granted.) For additional information on this case see The New York Times, Oct. 9, 1962, p. 32C., col. 2.

[56] Abernathy v. City of Irving, 355 S.W.2d 159 (Ky. Ct. App.), *cert. denied*, 371 U.S. 831 (1962).

[57] 210 U.S. 50 (1908).

[58] It was also contended that the expenditure would be an improper one under the Indian Appropriation Acts, but the Court held that the acts were inapplicable as to "Tribal Funds." *Id.* at 77.

[59] *Id.* at 82. It is interesting to note that the appellee argued that even a religious school was not a religious establishment. "The Constitution provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' A religious establishment, however, is not synonymous with an establishment

Since the "treaty funds" belonged to the Indians in *Quick Bear*, the government was really only a formal party to a transaction between the Indians and the Catholic Church.[60] There is no governmental favoring of

of religion. See *Bradfield v. Roberts*, 175 U.S. 291, upholding an appropriation for a Roman Catholic hospital. A school, like a hospital, is neither an establishment of religion nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in morality and religion, just as in a hospital there would be religious ministrations." *Id.* at 74 (appellee's brief).

As has been seen, this alleged "conflict" between the establishment and free exercise clauses is present in several religious freedom situations. Although not a true "conflict," it would seem that free exercise factors play a substantial role in decisions under the establishment clause. Note the following language written even before the *Sherbert* and *Bible Reading* decisions: "The proper harmonizing of the first and second clauses of the First Amendment lies in recognizing that the wearing of the religious garb by a teacher does not amount to state aid to religion prohibited by the first clause; but that to prohibit a teaching Sister from wearing the garb would infringe the free exercise of religion guaranteed by the second clause, and would establish an unconstitutional religious test as a qualification for public office." Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73, 90 (1949). "The fundamental position which I have described is generally summed up under two heads:—the principle of the separation of Church and State and the principle of religious liberty. I have combined them because, in our law and tradition, they are functionally related. Moreover, precise danger at the present stage of our development lies in the one-sided stress on the single aspect of separation of Church and State. Experience shows that an unbalanced and extreme application of this principle can give rise to religious discrimination and so destroy the full meaning of religious liberty." Henle, *American Principles and Religious Schools*, 3 ST. LOUIS U.L.J. 237, 239–40 (1955). "Obviously, a firm, realistic grasp of these two problems in their relation puts to the Court a much more severe task. It is much easier to hew one's way out of the difficulty with the axe of Madison's absolutism. The trouble is that the axe then falls on 'free exercise,' as the *McCollum* decision, in which the axe was more ruthlessly swung, luminously shows. But this is a perversion of the whole intent and philosophy of the First Amendment. And this is actually what has happened; so far from being instrumental to 'free exercise,' a means relative to an end, the 'establishment' clause (in the meaning of 'no aid to religion') has now assumed the primacy, the status of an absolute, an end-in-itself; and the 'free exercise' clause has become subordinate to it. The First Amendment has been stood on its head." Murray, *Law or Prepossessions?* 14 LAW & CONTEMP. PROB. 23, 33 (1949). See also KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 10 (1962).

It is later hinted at even in the *Everson* decision. "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. . . . While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

[60] Mr. Justice Rutledge dissenting in *Everson* distinguished the *Quick Bear* case as one dealing with private funds but pointed out that if the funds were public funds the expenditure would have violated the first amendment. *Id.* at 43 n.35.

religion at all and thus the case is not an establishment case.

In 1918 the Court decided the *Selective Draft Law Cases*[61] and again considered the establishment clause. In these cases the constitutionality of the selective draft laws was challenged, among other grounds[62] on the view that exemptions for ministers and theological students and provisions relieving members of certain pacifist religious sects from combatant duty were laws "respecting an establishment of religion." The Court held almost without comment that these provisions of the selective draft laws were constitutional. Mr. Chief Justice White, speaking for the Court, said:

> And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred [the selective draft law], because we think its unsoundness is too apparent to require us to do more.[63]

The reasoning behind this cavalier language is not clear. The law granting exemptions to theological students is plainly a law favoring religion, *as religion*. Apparently the only purpose involved in the exemption is to encourage religion as such, and thus the governmental action involved is solely on the basis of religion. Moreover, the provisions exempting certain pacifist sects from combatant duty might be viewed as laws preferring one religion over another. If this was the interpretation which the Court placed upon these facts, then its cavalier language might hide a narrow interpretation of the establishment clause to the effect, perhaps, that the clause only protected against laws affecting religious *institutions* or the establishment of a state church. However, the Court could have thought of these exemptions as simply part of a scheme providing nondiscriminatory recognition of religion which accommodated the draft laws to the religious beliefs of the various sects. The negative action of not drafting was simply noninterference with religion and not aid to it in a constitutional sense. Under this interpretation, the Court's obscure language could have encompassed a somewhat broader interpretation of the establishment clause, not only prohibiting the establishment of a church, but also, forbidding preference among churches or any laws aiding religion as well.

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[61] 245 U.S. 366 (1918).

[62] The selective draft laws were challenged on a host of grounds. Among them were that Congress lacked authority for such an enactment, that it delegates federal power to state officials, that it vests legislative and judicial power in administrative officers, and that it creates involuntary servitude in violation of the thirteenth amendment. Selective Draft Law Cases, 245 U.S. 366, 366–67 (1918).

[63] *Id.* at 389–90.

But negative governmental action can be as much aid as positive governmental action. Realistically, by any interpretation the Court seemed to feel that at least some aid to religion, *as religion,* was constitutional.[64]

But perhaps the most important factor which should be noticed in the *Selective Draft Law Cases* is that if the Court had held the draft law exemptions unconstitutional as establishments of religion, then the free exercise of religion by the pacifist sects would have been impaired. This impairment might not have been an unconstitutional prohibition of free exercise, but perhaps the Court was influenced by an attempt of Congress to avoid such impairment. Quite probably, then, if these *Selective Draft Law Cases* were to be decided today, the Court would reach the same result.

Twelve years after considering the *Draft Law Cases,* the Court decided *Cochran v. Louisiana State Bd. of Educ.*[65] In *Cochran,* the establishment question as such was not considered.[66] An establishment situation, however, was present. The facts were that the Louisiana state board of education provided secular school books to both public and parochial schools free of cost. The books were paid for out of the general tax revenues of the State of Louisiana. A Louisiana taxpayer brought suit contending that this free book scheme was an unconstitutional taking of private property for a private purpose. The Court held that the law was valid. Emphasizing that the law was intended to further a secular purpose, Mr. Chief Justice Hughes said:

> Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded. . . .[67] The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.[68]

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[64] Mr. Justice Frankfurter concurring in *McGowan* would seem to deny that the *Selective Draft Law Cases* stood for this proposition. He said in citing these cases: "Their 'establishment' contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear." McGowan v. Maryland, 366 U.S. 420, 468 (1961).

Perhaps the Court felt the aid so small as to be ignored, or similarly, perhaps the Court felt much as Mr. Justice Douglas wrote in *Zorach v. Clauson* that "we are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313.

[65] 281 U.S. 370 (1930).

[66] The relevance of the religious guarantees of the first amendment to the interpretation of the fourteenth amendment's due process clause was first made clear in Cantwell v. Connecticut, 310 U.S. 296 (1940).

[67] Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 375 (1939).

[68] *Ibid.* "Constitutional prohibitions against aid to sectarian schools are then avoided

This distinction is somewhat unrealistic. Clearly, unless the books were thrown away, the schools received some incidental economic benefits from the free textbook plan. To the extent that the schools were able to use these textbooks in place of those for which they would normally pay, some funds were available for use elsewhere, perhaps for use in providing religious training.[69] If, however, the books were of a type that were only supplementary to the school's normal texts, then possibly the school did not benefit. Since this is unlikely, the proper rationale of this case to be applied by analogy in the undoubted establishment cases, is not that there was no incidental benefit to religion from this plan, but that despite this incidental benefit the law was valid since its primary purposes and effects were secular. Municipal fire departments, sanitation facilities, water works, and police departments, etc., may also incidentally benefit religion and religious institutions without being unconstitutional under the establishment clause.

In a recent case, *Dickman v. School Dist.*,[70] presenting a situation almost converse to that in the *Cochran* case, the Court refused to hear an argument that the Oregon Constitution prohibiting state grants of textbooks to parochial schools had denied parochial students and their families free exercise of their religion. This case and the *Cochran* case, together clearly demonstrate the often thin line between an establishment and a free exercise attack.

It is arguable that in the *Cochran* as well as in the *Carlson* situation, to disqualify religious institutions from receiving governmental services *on the sole basis of religion* would interfere with the free exercise of religion. Nothing in the establishment clause should be interpreted to require such interference. It should be remembered that the *Cochran* case did not deal with the establishment clause as such. It would seem, however, that because it is an establishment situation, it would be some authority today in construing the establishment clause.

In the *Cochran*, as in the *Bradfield* case, the Court is careful to interpret

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by the use of the 'child benefit' theory, which was first successfully used in the textbook cases—that the direct benefit is conferred upon the child, with the school receiving only incidental aid." Note, 60 HARV. L. REV. 793, 796 (1947).

[69] Mr. Justice Rutledge dissenting in *Everson* sought to distinguish the *Cochran* case. "On the facts, the cost of transportation here is inseparable from both religious and secular teaching at the religious school. In the *Cochran* case the state furnished secular textbooks only." Everson v. Board of Educ., 330 U.S. 1, 29 n.3 (1947). For the reasons given above this distinction seems not at all clear.

[70] 366 P.2d 533 (Ore. Sup. Ct. 1961), *cert. denied*, Carlson v. Dickman, 371 U.S. 823 (1962). For constitutional questions presented by this case on appeal see 31 U.S.L. WEEK 3058 (Aug. 7, 1962).

the facts to avoid admitting even incidental aid to religion. This compulsion to avoid admitting even incidental support to religion suggests that the Court was at the time concerned with the constitutionality of such support. It is not certain, however, that the Court felt that nondiscriminatory aid to religion, as such, was unconstitutional, much less that laws carrying out secular purposes and only incidentally affecting religion might be unconstitutional. The *Selective Draft Law Cases* would suggest otherwise.[71] In any event, the practical effect of the *Bradfield* and *Cochran* cases is to allow incidental aid to religion if the purpose of the law is secular and the effect of the law on religion, if any, is only incidental. Any other result would impair the free exercise of religion.

In *Cantwell v. Connecticut*[72] in 1940, the Court held in a unanimous opinion that the safeguards of religious freedom of the first amendment were "incorporated" in the due process clause of the fourteenth, and as such were applicable against the states.

> The fundamental concept of liberty embodied in that Amendment [fourteenth amendment] embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.[73]

The Court held in *Cantwell* that a Connecticut law prohibiting religious solicitation without a license was invalid under the first amendment as "incorporated" in the fourteenth. Since the only direct effect on religion of this Connecticut law was that of prohibiting the exercise of religion, and not of supporting religion, it is doubtful that *Cantwell* was a true establishment case. In fact, it seems to be even more a "free speech" case than a religious guarantee case. In any event, it is usually quoted as establishing the rule that the establishment clause of the first amendment is applicable to the states as "incorporated" in the fourteenth.[74] Whether dictum or not in this case, subsequent cases have confirmed this to be the law.[75]

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[71] *But see* note 64 *supra*.

[72] 310 U.S. 296 (1940).

[73] *Id.* at 303.

[74] CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 757 & n.4 (1953). See also the concurring opinion of Mr. Justice Cardozo in Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 265 (1934).

[75] There could be no doubt after the *Everson* decision. "All three opinions in the *Everson* case assume that the Fourteenth Amendment includes the 'establishment of

Although *Cantwell* is arguably not an establishment case at all, it contains some often quoted language which has had some effect in establishment cases. Speaking of both the establishment and free exercise clauses of the first amendment, the Court said:

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization of form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.[76]

On its face, this language would indicate a narrow scope for the establishment clause. Literally read, it does not prohibit nondiscriminatory aid to religion, *as religion*, nor would it even prohibit a noncompulsory established church. This language, however, was written in the context of a free exercise case. Consequently, it is not surprising that the double aspect spoken of by the Court is really the double aspect of the free exercise clause alone. That is, the freedom to choose and belong to a religion, and freedom to practice it after it has been chosen. It seems unlikely that this language in the *Cantwell* opinion was meant to exhaust the requirements

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religion' clause." Note, 60 HARV. L. REV. 793, 798 n.53 (1947). *But see* Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3, 19 n.60 (1949). At the present time, former Justice Frankfurter, although he joined in *Cantwell*, Mr. Justice Harlan of the Court, and notably Professor Corwin of the commentators disagree with this "incorporation" theory.

See Mr. Justice Frankfurter's concurring opinion in the *Sunday Closing Law Cases*, 366 U.S. 459 (1961). "Although the Court has held that the due process clause of the fourteenth amendment does not incorporate the entire Bill of Rights, it has consistently treated the religious guarantees embodied in the first amendment as applicable to the states as well as to the federal government. At first only Justice Jackson found fault with this practice, but more recently Mr. Justice Harlan has followed suit. In the present cases [*Sunday Closing Law Cases*] Mr. Justice Frankfurter, after vigorous questioning of counsel in oral argument, seems to have adopted the same position, declaring that only 'the general principles of church-state separation were found to be included in the . . . Due Process Clause . . . .' " Bickel, *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 151 (1961). See generally Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949). However, to some extent Justice Frankfurter and Harlan seem to reach about the same result through the more undefined standards of the due process clause. Witness the identical result reached on this issue by both the majority and concurring opinions in *McGowan*.

[76] Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

of the establishment clause. Instead, it should be taken in the light of the free exercise context of the case.[77]

The modern law on the interpretation of the "establishment of religion" clause began in 1947, with the decision in *Everson v. Board of Educ.*[78] The facts in the *Everson* case were that New Jersey had enacted a statute authorizing payment of general tax funds for transportation of school children to both public and parochial schools. A district taxpayer in New Jersey challenged this law as a "law respecting an establishment of religion."[79] In an opinion by Mr. Justice Black, the Court held that the New Jersey law was valid.[80] Although the Court intimated that the law approached the verge of New Jersey's constitutional power,[81] it emphasized the secular purpose of the law, saying:

> [W]e must be careful, in protecting the citizens of New Jersey against state established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.[82]

Furthermore, it is apparent from the above language, that the Court was concerned with the "conflict" between the establishment clause and the free exercise clause.[83]

> [O]ther language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.[84]

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[77] Failure to read this language in its "free exercise" context has caused some confusion. See Note, 28 GEO. WASH. L. REV. 579 (1960). "The court [sic] [in *Cantwell v. Connecticut*] defined the prohibition against establishment as absolute, while the protection of free exercise was said to be relative, since individual liberties of action are subject to reasonable exercise of the state police power." *Id.* at 592.

[78] 330 U.S. 1 (1947), 60 HARV. L. REV. 793 (1947), 96 U. PA. L. REV. 230 (1947).

[79] The law was also challenged as an expenditure of public funds for a private purpose—much as in the *Cochran* case. Everson v. Board of Educ., 330 U.S. 1, 5–8 (1947).

[80] Mr. Justice Black wrote the opinion of the Court. Mr. Justice Jackson dissented in an opinion joined by Mr. Justice Frankfurter. Mr. Justice Rutledge dissented in an opinion joined by Justices Frankfurter, Jackson, and Burton.

[81] "But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power." Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

[82] *Ibid.*

[83] See note 59 *supra.*

[84] Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

After making a survey of the historical background of the first amendment,[85] the Court concluded that not only was it intended to prohibit preference between religions and to prohibit an established church, but it was also intended to prohibit support to religion. In the most famous and perhaps the most important language of the Court in construing the establishment clause, the Court said:

> 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 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 organizations 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.'[86]

It is significant that this language from the *Everson* opinion was set out in full both in the *Torcaso*[87] and *McGowan* cases.[88] This seems to be a clear indication that henceforth, the establishment clause is to be broadly interpreted. Just how broadly, however, is not yet certain. On the one hand, this language if strictly construed would not only prohibit direct aid to religion or aid to religion, *as religion*, but would also prohibit incidental aid to religion arising from the operation of a law with primarily a secular purpose and effect. It should be noted that the *McGowan* case upheld "blue laws" incidentally affecting religion despite the fact that the Court set out in full the famous *Everson* language. Thus, since the laws upheld in both *Everson* and *McGowan* incidentally aided religion, it is probable that this strict construction of the *Everson* language was not intended. Rather, the main purpose of the language was to settle the heretofore unsettled question of whether the establishment clause pro-

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[85] *Id.* at 8–15.
[86] *Id.* at 15–16.
[87] Torcaso v. Watkins, 367 U.S. 488, 492–493 (1961).
[88] McGowan v. Maryland, 366 U.S. 420, 443 (1961).

hibited something more than just a state church. The answer of the Court was an overwhelming yes.[89]

Another phrase of rather uncertain meaning from this famous paragraph in the *Everson* opinion is that of "*vice versa*,"[90] apparently saying that religious organizations can neither openly nor secretly participate in the affairs of state or federal government. This language is remarkable, for on its face, the establishment clause operates only on government.[91] But by this language, the Court seems to be saying that the establishment clause may also operate directly as a restraint on religious institutions.[92] Although the question has not yet arisen, its implications are astonishing. Does it mean that a religious institution is constitutionally prohibited from lobbying; or that a religious institution is constitutionally prohibited from endorsing candidates for public office? It seems almost certain that the Court did not intend such a broad interpretation of the "affairs of government." Furthermore, such an interpretation would seem to violate the free exercise clause. The point is that much of this *Everson* language is ambiguous and it is doubtful whether the Court always intended this language to be interpreted strictly.[93]

In the *Everson* decision, the Court announced a major policy decision, only hinted at in previous cases, that the establishment clause incorporated the principles of separation of church and state.[94] Not only did it prohibit an established church and preference among religions, but it

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[89] "Not simply an established church, but any law respecting an establishment of religion is forbidden." Everson v. Board of Educ., 330 U.S. 1, 31 (1947) (Mr. Justice Rutledge dissenting). "There is no answer to the proposition, more fully expounded by Mr. Justice Rutledge, that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which would directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' exponse." *Id.* at 26 (Mr. Justice Jackson dissenting).

[90] In the famous paragraph quoted above. *Id.* at 16.

[91] "*Congress* shall make no law . . . ." (Emphasis added.) U.S. CONST. amend. I.

[92] Moreover, Mr. Justice Jackson wrote in his dissent in *Everson* that: "It [the first amendment] was intended not only to keep the states' hands out of religion, *but to keep religion's hands off the state* . . . ." (Emphasis added.) Everson v. Board of Educ., 330 U.S. 1, 26–27 (1947).

[93] *Id.* at 19. Mr. Justice Jackson pointed this out in his dissenting opinion in *Everson.* "In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support tot heir commingling in educational matters."

[94] "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18. See generally Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949).

went further than this and sought to isolate the affairs of government from the affairs of religion, or in Jefferson's famous language, to erect "a wall of separation between church and State."[95] The dissenters also agreed with this policy. In the words of Mr. Justice Rutledge:

> It [the first amendment] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. . . . The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.[96]

The dissenters, however, disagreed with the majority as to where the wall should be built.[97]

It is interesting to note that in the *Sunday Closing Law Cases*, unlike the *Everson* case, there was only one dissent on the establishment issue.[98] Furthermore, instead of dissenting, Mr. Justice Frankfurter, the sole remaining dissenter on the Court from *Everson*, wrote a concurring opinion in which he emphasized that the establishment clause was not necessarily violated by incidental aid to religion.

> With regulations which have other objectives the Establishment Clause, and the fundamental separationist concept which it expresses, are not concerned. These regulations may fall afoul of the constitutional guarantee against infringement of the free exercise or observance of religion. Where they do, they must be set aside at the instance of those whose faith they prejudice. But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied.[99]

Concurring in the *Sunday Closing Law Cases*, Mr. Justice Frankfurter also said:

> The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually

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[95] From Jefferson's Danbury Letter; see PADOVER, THE COMPLETE JEFFERSON 518–19 (1943).

[96] Everson v. Board of Educ., 330 U.S. 1, 31–33 (1947); see note 89 *supra*.

[97] "The majority [in *Everson*] held that the New Jersey law approached 'the verge' of the power retained by the states under the 'establishment of religion' restriction; the minority contended that the verge had been transgressed." Pfeffer, *Church and State; Something Less than Separation*, 19 U. CHI. L. REV. 1 (1951).

[98] Mr. Justice Douglas.

[99] Sunday Closing Law Cases, 366 U.S. 459, 466 (1961).

> all of the Colonies had done, make of religion, as religion, an object of legislation.[100]

This language and result seems somewhat different from the language of Mr. Justice Jackson's dissenting opinion in *Everson*, joined by Mr. Justice Frankfurter, that:

> It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school.[101]

The point of this comparison between the number of dissenters in *Everson* and the *Sunday Closing Law Cases*, and the language of Mr. Justice Frankfurter in those cases, is simply to illustrate a possible tendency of the Court, at least in language, toward a greater acceptance of secular laws which only incidentally have establishment effects on religion. That is, the comparison illustrates a possible tendency toward a more liberal secular purpose test, a tendency toward greater acceptance of the constitutionality of governmental action taken on other than religious grounds and which only incidentally affects religion.[102] This increased acceptance is in spite of the apparently inclusive language of the *Everson* opinion.[103] Arguably, however, the *Everson* and *McGowan* cases are fundamentally different in that the *Everson* case involves aid to a religious *institution* and is thus a stronger establishment case than *McGowan*. In any event, it seems fairly certain that neither in *Everson* nor in the *Sunday Closing Law Cases* did the Court intend to prohibit all laws incidentally affecting religion. Such a result would not only unnecessarily cripple government, but would also impair the free exercise of religion.

The next establishment case before the Court was *McCollum v. Board of Educ.*[104] in 1948. In *McCollum*, a taxpayer and parent whose child was enrolled in the Illinois school system brought an action for manda-

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[100] *Id.* at 465.

[101] Everson v. Board of Educ., 330 U.S. 1, 24 (1947).

[102] Professor Philip B. Kurland suggests as a test for constitutionality under the "religious freedom" clauses of the first amendment that: "the freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *Of Church and State and The Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

[103] For this *Everson* language was set out in full twice during the 1960 term in *McGowan v. Maryland* and *Torcaso v. Watkins*.

[104] 333 U.S. 203 (1948), 60 HARV. L. REV. 793 (1947), 43 ILL. L. REV. 374 (1948), 96 U. PA. L. REV. 230 (1947).

mus against the board of education seeking to halt a program of "released time" sectarian religious education.[105] It was contended that the program was a "law respecting an establishment of religion." In an opinion by Mr. Justice Black, the Court largely followed the *Everson* approach and held that the program was an unconstitutional establishment of religion since it provided aid to sectarian groups by affording them use of the tax-supported public school buildings and use of the state's compulsory public school machinery.[106] The *McCollum* case seems rightly decided under

[105] The program was essentially that religious teachers working for private religious groups were allowed to come regularly into the school buildings during school hours and teach a thirty-minute class in their particular religion. Students not wishing to take this instruction were required to leave their classrooms and go elsewhere in the school buildings to continue their secular studies.

[106] "The case [*McCollum*] seems to stand on the compulsive feature." Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1343 (1949). The Court in *McGowan* said in distinguishing *McCollum*: "In *McCollum*, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar. In *MCollum*, the only alternative available to the nonattending students was to remain in their classrooms; the alternatives open to nonlaboring persons in the instant case are far more diverse. In *McCollum*, there was direct cooperation between state officials and religious ministers; no such direct participation exists under the Maryland laws. In *McCollum*, tax supported buildings were used to aid religion; in the instant case, no tax monies are being used in aid of religion." 366 U.S. at 452–53. *But see* Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3, 18–20 (1949). See also Mr. Justice Jackson's dissent in *SAIA v. New York*, 334 U.S. 558, 566 (1948); Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 33 (1962). Mr. Justice Frankfurter wrote a concurring opinion in which he emphasized the particular importance of separation of church and state in the school system.

Mr. Justice Jackson expressed concurrence in Mr. Justice Frankfurter's opinion and the result of the Court. In a short opinion of his own he questioned the standing in the case and urged that care should be taken to insure that religion as education could be taught. Mr. Justice Reed, dissenting, questioned whether the establishment clause was intended to do more than prohibit an established church or preference among religions, although he did not really rely on the distinction. Instead, Mr. Justice Reed seemed principally to rely on the nature of the aid to religion as the distinguishing factor. Aid to religion in an unconstitutional sense must be purposeful assistance to a religious *institution* or organization such as the church itself. "But 'aid' must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions." Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 248 (1948). In urging that the particular aid involved here was not enough to be unconstitutional, he emphasized the religious nature of our institutions. In fact, Mr. Justice Douglas' famous statement in *Zorach v. Clauson* that "We are a religious people whose institutions presuppose a Supreme Being" could easily have been suggested by Mr. Justice Reed's dissent. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

any interpretation of the *Everson* language, because the aid to religion was not merely incidental to a secular purpose, but was direct encouragement to religion. Since the law did not merely provide nonsectarian teaching of the history of religious thought,[107] but instead provided sectarian religious training, it was aid to religion, *as religion.* Moreover, far from protecting the free exercise of religion, the religious accommodation attempted in *McCollum,* in practical effect threatened the free exercise of religion of some of the pupils not members of the major religious faiths. The nature of the plan was such that it involved subtle indirect pressures to conform to the prevailing religious beliefs.

The *McCollum* result further points out that the establishment clause applies in general to laws favoring religion, and not simply to laws favoring religious *institutions.* Only Mr. Justice Reed seemed to feel that the establishment clause should be so limited. The *McCollum* decision, however, brought forth a storm of protest from those who felt much as Mr. Justice Reed did, that the interpretation of the establishment clause was too broad. In particular, Professor Corwin and Professor O'Neil offered persuasive historical examinations of the origin of the first amendment to prove that it did not prohibit aid to religion, *as religion,* but was instead concerned with prohibition of an established church and preference among religions.[108] However historically accurate this argument might be, it is clearly not the law today.

The Court seemed to retreat somewhat from the *McCollum* decision in *Zorach v. Clauson,*[109] decided in 1952. In *Zorach* a New York program of sectarian religious instruction, similar to that in *McCollum* except that it involved "dismissed time" rather than "released time," was attacked as a "law respecting an establishment of religion." Under this New York plan, unlike the Illinois plan, neither were the tax-supported school facilities used for religious instruction nor was the same degree of compulsion

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[107] It seems probable that a nonsectarian course in the history of religious thought would be permissible, for such a course is a general educational course. In fact, the Court's opinion in the *Bible Reading Cases* strongly suggests that objective religious studies would be constitutional. "At the other extreme, undoubtedly the schools can teach the history of religion and religious ideas." Sullivan, *Religious Education in the Schools,* 14 LAW & CONTEMP. PROB. 92, 112 (1949). See Mr. Justice Jackson's short opinion in *McCollum.* See also Louisell & Jackson, *Religion, Theology, and Public Higher Education,* 50 CALIF. L. REV. 751 (1962).

[108] See O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949); Corwin, *The Supreme Court As National School Board,* 14 LAW & CONTEMP. PROB. 3 (1949).

[109] 343 U.S. 306 (1952); see 37 VA. L. REV. 1146 (1951); 61 YALE L.J. 405 (1952).

used. Nevertheless, it was urged that "the weight and influence of the school is put behind . . . [the] program . . . ."[110] Largely ignoring this alleged weight and influence, Mr. Justice Douglas, writing for the majority, wrote:

> The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.[111]
>
> We are a religious people whose institutions presuppose a Supreme Being.[112]

The Court then held that the plan was constitutional, despite alleged reliance on the *McCollum* decision. The dissenters, however, clearly regarded the decision as to some extent a retreat from *McCollum*. Mr. Justice Black dissented in an opinion agreed with by Mr. Justice Frankfurter[113] in which he stated that *McCollum* had been disregarded by the Court in reaching its decision. Justices Jackson and Frankfurter also dissented, pointing out that the New York plan substantially aids religion by lending its power of coercion to the plan.

Like the plan in *McCollum*, the New York plan clearly seems to be a law aiding religion, *as religion*. However, unlike the plan in *McCollum*, the New York plan did not constitute the same danger to the free exercise of religion as did the Illinois plan. Moreover, the school system is a governmental program which takes a great deal of a child's time which would otherwise be available for religious training. Thus, it could be argued that when the legislature makes a determination that releasing some of that time for the purpose of religious study will not hinder the secular purpose of the school system, and if such a program does not actually impair or threaten free exercise in any way, then the program is a mere accommodation to religion.[114] This enhances religious freedom,

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[110] Zorach v. Clauson, 343 U.S. 306, 309 (1952).

[111] *Id.* at 312.

[112] *Id.* at 313.

[113] "The result in the *McCollum* case . . . was based on principles that received unanimous acceptance by this Court, barring only a single vote. I agree with MR. JUSTICE BLACK that those principles are disregarded in reaching the result in this case." *Id.* at 322–23 (dissenting opinion of Mr. Justice Frankfurter).

[114] "Here, as we have said, the public schools do no more than *accommodate* their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to *accommodate* the religious needs of the people." (Emphasis added.) *Id.* at 315.

and should not be held a violation of the establishment clause. This argument is somewhat tenuous in this case, however, since it is not clear that the New York plan is completely free from the subtle pressures indirectly threatening free exercise.

In any event, possibly the different result in *Zorach* was reached largely because of the difference in degree of the threat to free exercise in the two cases.[115] Arguably, the result as well as the language of *Zorach* is a retreat from the principles of *Everson* and *McCollum*.[116]

It was ten years after *Zorach* before the Court decided another establishment case. In the *Sunday Closing Law Cases* the constitutionality of the Sunday closing laws of Maryland, Massachusetts, and Pennsylvania was upheld against an establishment attack. Mr. Chief Justice Warren, writing for the Court, set forth a comprehensive explanation of the establishment clause. In doing so, he clearly reaffirmed the *Everson* prin-

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[115] Mr. Justice Brennan would deny that *McCollum* and *Zorach* are distinguishable in terms of the free exercise claims advanced in both cases. See School Dist. v. Schempp, 374 U.S. 203 (1963).

[116] 342 U.S. 429 (1952). In *Doremus v. Board of Educ.*, another establishment case which came before the Court in 1952, the Court had to decide whether a New Jersey statute providing for the reading without comment of five verses of the Old Testement at the opening of each public school day was invalid nnder the establishment clause. From time to time, several states have enacted laws requiring that the Bible be read at the opening of each school day in the public schools.

New Jersey has such a statute enacted as early as 1916. It currently provides: "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day . . . ." N.J. STAT. ANN. ch. 14, § 18:14–77 (1940).

"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." PA. STAT. ANN. tit. 24, § 15–1516 (1962). Pennsylvania had a "Bible reading" statute as early as 1913.

"Bible reading" statutes such as the Pennsylvania and New Jersey statutes discussed above are on their face laws favoring religion, *as religion*. For example, N.J. STAT. ANN. ch. 14, § 18:14–78 (1940), provides that: "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held . . . ." Moreover, the requirement that a small number of passages from the Bible be read each day at the start of public school is highly suggestive of a religious purpose, not merely a secular purpose. "The customary argument that it ["Bible reading"] is merely a literary exercise is not very realistic; the statutes which require bible reading have a strongly pious sound, and are, one would suppose, intended to promote religion in the young." Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1339 (1949). The Court, however, did not decide the question. Instead it held that there was no standing to bring the action since at the time of the appeal the plaintiffs had no children in the public schools.

ciple that the establishment clause does more than prohibit an established church. "It [the Court] has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church."[117] But the Court also pointed out that the establishment clause does not necessarily prohibit incidental aid to religion.

> However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that religious considerations . . . [demand] such regulation.[118]

> [T]he Court found that the purpose and effect of the statute in question [in the *Everson* case] was general 'public welfare legislation.'[119]

Since the Court also found that these Sunday closing laws were primarily secular in purpose and effect,[120] they declared that they were not unconstitutional establishments of religion.

Mr. Justice Frankfurter, in a concurring opinion joined by Mr. Justice Harlan, took substantially this same position. "But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."[121] Both the majority and concurring opinions intimate that in order for a secular law only incidentally affecting religion to be constitutional, it must not be possible to attain the same secular ends by means not even incidentally affecting religion.[122] Of

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[117] McGowan v. Maryland, 366 U.S. 420, 442 (1961).

[118] *Ibid.*

[119] *Id.* at 443–44; see 75 HARV. L. REV. 40, 147 (1961).

[120] The Court admitted that originally Sunday "blue laws" were motivated by religious forces. "There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces." McGowan v. Maryland, 366 U.S. 420, 431 (1961); see Johnson, *Sunday Legislation*, 23 KY. L.J. 131 (1934). Continuing, the Court said: "In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States." McGowan v. Maryland, *supra* at 444.

[121] *Id.* at 466.

[122] Mr. Justice Brennan made a similar point in his concurring opinion in the *Bible Reading Cases*. School Dist. v. Schempp, 374 U.S. 203 (1963). "We are told that the State has other means at its disposal to accomplish its secular purpose, other courses that would not even remotely or incidentally give state aid to religion. . . . However rele-

course, deciding which secular ends are the same, and which do not even incidentally affect religion leaves some uncertainty; but it does provide basic guidelines for decision.

Justices Brennan and Stewart dissented in the *Sunday Closing Law Cases* on the free exercise point,[123] thereby implying that the secular purpose must be stronger to uphold constitutionality under the free exercise clause than under the establishment clause.

Mr. Justice Douglas wrote the lone dissent on the establishment issue in the *Sunday Closing Law Cases,* although he also dissented on the free exercise issue. He urged that Sunday "blue laws" are both historically and presently laws for the support of certain religions. Not content with this distinction, he further maintained that there was no room for "balancing" in the area of religious freedoms.[124] Thus, to some extent, in the *Sunday Closing Law Cases* Mr. Justice Douglas rejected a liberal secular purpose test; and this rejection is even more evident in his concurring opinion in *Sherbert v. Verner.*

The result of the *Sunday Closing Law Cases,* is to sustain the obvious requirement of effective government that at least some laws having a secular purpose and effect and only incidentally affecting religion be valid.[125] Since the result in the *Everson* case was, in effect, exactly this, it is apparent that the *Everson* language carefully set out in full in the *Sunday Closing Law Cases* is not to be too strictly interpreted. However, it is also apparent that a narrow interpretation of the establishment clause has been rejected and that the establishment clause prohibits not merely an established church, but also some other forms of aid to religion, *as religion.*[126] There can be no doubt that despite the result in the *Sunday*

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vant this argument may be, we believe that the factual basis on which it rests is not supportable." McGowan v. Maryland, 366 U.S. 420, 449–50 (1961). "Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand." *Id.* at 466–67 (Mr. Justice Frankfurter's concurring opinion); *cf.* 23 U. PITT. L. REV. 222 (1961); 32 ROCKY MT. L. REV. 243 (1960). These notes attack "blue laws" on a basis similar to the above.

[123] See note 27 *supra.*

[124] "In his [Mr. Justice Douglas] view, the religious guarantees of the first amendment admit of 'no room for balancing' and prescribe all laws 'respecting an establishment of religion.' He then set forth the standard to be used: 'There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it'," 75 HARV. L. REV. 40, 148 (1961).

[125] "The Court did not consider whether the expense of enforcing Sunday laws constitutes monetary aid to religion." *Id.* at 148 n.367.

[126] "We do not hold that Sunday legislation may not be a violation of the 'Establish-

Closing Law Cases, the principles of *Everson* have been reaffirmed. The broad language of *Zorach* seems largely forgotten.[127]

Shortly after the decision in the *Sunday Closing Law Cases*, the Court decided another case in which the establishment issue was pertinent. In that decision, *Torcaso v. Watkins*,[128] the Court again set out in full the famous paragraph from the *Everson* decision.[129] Petitioner in *Torcaso* sought a writ of mandamus to compel issuance of a notary commission to himself. Alleging that he was denied the commission simply because he refused to take an oath that he believed in the existence of God, as required by the Maryland Constitution, he asserted that the law was an establishment of religion and prohibited his free exercise thereof. Article thirty-seven of the Declaration of Rights of the Maryland Constitution provided: "[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this state, other than a declaration of belief in the existence of God. . . ."[130] In a seven-two decision, the Court held that this requirement "unconstitutionally invades the appellant's freedom of belief and religion." Actually, the Court did not specifically place the decision on either the establishment or free exercise clause. The language of the Court was: "This Maryland religious test for public office unconstitutionally *invades the appellant's freedom of belief and religion* and therefore cannot be enforced against him."[131] Consequently, insofar as the decision was based on the establishment clause it clearly implemented the free exercise clause and in no way interfered with the free exercise of religion.[132]

The *Torcaso* opinion again reaffirms that the establishment clause is

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ment' 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." McGowan v. Maryland, 366 U.S. 420, 453 (1961).

[127] Mr. Justice Douglas, dissenting, mentioned *Zorach*. "The Puritan influence helped shape our constitutional law and our common law. . . . For these reasons we stated in *Zorach v. Clauson*. . . . 'We are a religious people whose institutions presuppose a Supreme Being.' " *Id.* at 563.

[128] 367 U.S. 488 (1961).

[129] *Id.* at 492–93.

[130] See note 10 *supra*.

[131] *Ibid.*

[132] Justices Frankfurter and Harlan concurred without opinion. Although only a speculation, perhaps they were unwilling to join in the majority opinion largely because the "incorporation" theory relied upon by the Court and which was also a basis of the *Everson* language set out in full, was unacceptable to them. As we have seen in the *Sunday Closing Law Cases*, however, and as this case somewhat demonstrates, at least so far their "due process approach" seems to produce essentially the same resnlt.

broader than simply a prohibition against an established church. The inclusion of the famous *Everson* paragraph in full, when arguably it was unnecessary, clearly points out that the interpretation of the Court is one of breadth for the establishment clause. Furthermore, Mr. Justice Black, writing for the Court, sharply limits the *Zorach* case.

> The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in *Zorach v. Clauson* . . . 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.'[133]

Torcaso is further notable in that it specifically includes non-believers under the protection of the "establishment" clause, a result which was hinted at in *Everson*.[134]

> Neither [a state nor the federal government] can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[135]

This broad definition of religion under the establishment clause, one of obvious importance, increases the complexity of analysis under the clause. Thus, a law which formerly might be thought of as merely giving aid to all religions might now be attacked not only as giving aid to religion, but also as preferring religion over non-believers. As a practical matter, then, the distinction between aid and prefer under the establishment clause becomes even more tenuous.

Torcaso is not a departure from the *Sunday Closing Law Cases* simply because it reaches a different result. For in *Torcaso*, unlike the *Closing Law Cases*, the Court found that the Maryland law served no apparent secular purpose, but was simply a law affecting religion, *as religion*. The Court said:

> There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland. The power and authority of the State of Maryland thus is put on the side of one particular

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[133] Torcaso v. Watkins, 367 U.S. 488, 494 (1961).
[134] Everson v. Board of Educ., 330 U.S. 1, 16 (1947).
[135] Torcaso v. Watkins, 367 U.S. 488, 495 & n.11 (1961).

> sort of believers—those who are willing to say they believe in 'the existence of God.'[136]

Thus *Torcaso* in no way affects the result of the *Closing Law Cases* that some laws having a secular purpose and effect and only incidentally affecting religion are valid. The combined language of both the *Sunday Closing Law Cases* and the *Torcaso* case leaves no doubt, however, that the Court intends to give a broad interpretation to the establishment clause.

The next establishment case,[137] *Engel v. Vitale*,[138] was decided during the October term, 1961, only a year after the *Sunday Closing Law Cases* and *Torcaso* were decided. In the *Engel* case, a local board of education in New York directed that a prayer composed by the State Board of Regents be said aloud by each class in the presence of a teacher at the beginning of each school day. This officially composed Regents' prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[139] The regulations adopted by the board of education included procedures for the protection of persons who objected to reciting the prayer. Thus, students could remain silent during the exercise or be excused entirely from it, and school authorities were prohibited from commenting on participation or non-participation.

The parents of ten pupils brought an action alleging that the state law authorizing the school district to use the prayer in the public schools and the school board regulation ordering the recitation of the prayer were unconstitutional establishments of religion. Mr. Justice Black, writing for the Court, agreed that the practice was unconstitutional:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[140]

The majority opinion also emphasized that the decision under the estab-

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[136] *Id.* at 489–90.

[137] Prior to the *Engel* case, however, the Court had dismissed a challenge to Rhode Island's religious tax exemptions in a per curiam decision for lack of a substantial federal question. The case involved was General Fin. Corp. v. Archetto, 176 A.2d 73 (R.I. Sup. Ct. 1961), *appeal dismissed*, 369 U.S. 423 (1962). Mr. Justice Frankfurter and Mr. Justice White took no part in the consideration or decision of this case.

[138] 370 U.S. 421 (1962).

[139] *Id.* at 422.

[140] *Id.* at 425.

lishment clause in this case had the effect of implementing the free exercise clause.

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship does not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.[141]

The Court further found that the New York program of daily classroom prayer was clearly a religious activity without independent secular purpose. In a footnote to the decision, the Court distinguished such religious activities from mere patriotic or ceremonial exercises.

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.[142]

Mr. Justice Douglas wrote a concurring opinion emphasizing that the Government cannot constitutionally finance a religious exercise in any form.[143] Moreover, his definition of religious exercise seemed to go significantly beyond that of the majority opinion.

The lone dissent was written by Mr. Justice Stewart,[144] who in effect advocated a return to a narrow interpretation of the establishment clause one which would prohibit only an established religion or state church.

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[141] *Id.* at 430–31; see Cahn, *On Government and Prayer*, 37 N.Y.U.L. Rev. 981, 986–87 (1962); Comment, 63 Colum. L. Rev. 73, 93–94 (1963). *But see* Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25, 26 & n.3, 39 (1962). Significantly perhaps, in the *Bible Reading Cases* the Court set out this quotation in full. See School Dist. v. Schempp, 374 U.S. 203, 221 (1963).

[142] Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).

[143] *Id.* at 437.

[144] *Id.* at 444. Justices Frankfurter and White took no part in the decision of this case. *Id.* at 436.

It is significant that Mr. Justice Stewart, the lone dissenter, saw no threat to free exercise in the New York program.

> The Court does not hold, nor could it, that New York has interfered with the free exercise of anybody's religion. For the state courts have made clear that those who object to reciting the prayer must be entirely free of any compulsion to do so, including any 'embarrassments and pressures.'[145]

In a tradition breaking public statement, Mr. Justice Clark, who joined in the Court's opinion in *Engel,* pointed out his interpretation of the *Engel* decision.

> Here was a state-written prayer circulated to state-employed teachers with instructions to have their pupils recite it in unison at the beginning of each school day. . . . The Constitution says that the government shall take no part in the establishment of religion. No means no. . . . As soon as the people learned that this was all the court decided—not that there could be no official recognition of a divine being or recognition on silver or currency of 'in God we trust' or public acknowledgment that we are a religious nation—they understood the basis on which the court acted.[146]

This comment, of course, raises interesting questions of authority. Most narrowly construed, though, it at least indicates that Mr. Justice Clark would somewhat limit the *Engel* decision.

One of the principal purposes of the establishment clause is to implement the free exercise clause. Thus, it is in just the sort of situation in which free exercise is indirectly threatened and in which the free exercise clause alone might be unable to deal with the problem, that the establishment clause should be applicable. As Mr. Justice Black pointed out, the *Engel* case presented precisely this type of threat. Moreover, another purpose of the establishment clause is to prevent government from promoting one religious belief at the expense of other religions or, under the *Torcaso* test, even at the expense of non-believers. Yet our schools occupy a particularly important position in the formation of belief and opinion. Furthermore, a prayer is by its very nature closely akin to belief. These factors almost certainly influenced the Court in its decision declaring the use of an officially written prayer in the New York schools unconstitutional.

Similarly, perhaps the same factors influenced Mr. Justice Frankfurter, concurring in *Illinois ex rel. McCollum v. Board of Educ.* His emphasis

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[145] *Id.* at 445.

[146] The Miami Herald, Aug. 5, 1962, p.12A, col. 1; see note 11 *supra.*

on separation of church and state in the school system was perhaps due to the pervasive effect of the public school system in influencing belief. Thus, he said,

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.[147]

Similar factors may have also influenced the Court in the *Torcaso* case, since the law in question took the peculiarly obnoxious form of an oath requiring an affirmation of a particular belief. The Court said, "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'."[148]

The *Engel* case, then, seems correctly decided, since the New York program involved both an indirect threat to free exercise and an attempt to promote one religious belief at the expense of others, both made doubly pernicious by their presence in the school system, and neither justified by an independent secular purpose.

The next establishment decision by the Supreme Court, *Commonwealth v. Arlan's Dept. Store, Inc.*,[149] involved a challenge to the constitutionality of the Kentucky "blue laws," which differ from the Sunday closing laws of some other states in that they contain exemptions for those who observe a sabbath other than Sunday. Thus, they provide that: "Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty if they observe as a Sabbath one day in each seven."[150] The Kentucky Court of Appeals upheld the "blue laws," and in a memorandum opinion the Supreme Court dismissed the challenge with the order that no substantial federal question was presented. Mr. Justice Douglas, however, dissented saying that the "blue laws" and exemptions were "an aid to all organized religions," and were thus unconstitutional.[151]

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[147] 333 U.S. 203, 231 (1948).

[148] Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

[149] 357 S.W.2d 708 (Ky. Ct. App. 1962), *appeal dismissed*, 371 U.S. 218 (1962) (appeal dismissed for want of a substantial federal question).

[150] Arlan's Dept. Store, Inc. v. Kentucky, 371 U.S. 218, n.1 (1962).

[151] "The religious nature of this state regulation is emphasized by the fact that it exempts 'members of a religious society' who actually observe the Sabbath on a day other than Sunday. The law is thus plainly an aid to all organized religions . . . ." *Id.* at 220. Mr. Justice Douglas also renewed his objections to Sunday closing laws in general.

It should also be noted that the *Commonwealth* case presented an additional establishment question to those decided in the *Sunday Closing Law Cases*, and one which uniquely involves the relationship between the free exercise and establishment clauses. Because of this unique relationship, this case will be discussed at greater length subsequently in this paper. It will suffice here to say that any other decision in the *Commonwealth* case would unnecessarily impair the free exercise of religion.

The most recent establishment decisions of the Court, *Murray v. Curlett, School Dist. v. Schempp*[152] and *Sherbert v. Verner*,[153] have thrown additional light on this unique relationship between the free exercise and establishment clauses. The *Murray* and *Schempp* cases, decided jointly and popularly known as the *Bible Reading Cases*, were finally decided after lengthy efforts to get such a case before the Court.[154]

In *Murray*, the Baltimore School Board enacted a rule pursuant to a Maryland statute which provided for holding opening exercises in the public schools consisting of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." The rule further provided for substituting different versions of the *Bible* and for excusing any child from participating or attending upon written request of his parent. The *Schempp* case, arising in a similar fact situation, involved a Pennsylvania law requiring that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." Like the Maryland rule, the Pennsylvania law provided for excusing any child upon the written request of his parent.

In an eight-one decision, the Court held that these practices and laws were unconstitutional under the establishment clause, as applied to the states by the fourteenth amendment. Interestingly, it was Mr. Justice Clark who had given the unprecedented speeches on *Engel*, who delivered the Court's opinion. Although seven other Justices joined in the opinion

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[152] 374 U.S. 203 (1963) (decided jointly with *Murray v. Curlett*).

[153] 374 U.S. 398 (1963).

[154] For a history of *School Dist. v. Schempp*, see 177 F. Supp. 398 (E.D. Pa. 1959), *on remand*, 201 F. Supp. 815 (E.D. Pa. 1962), *appeal docketed*, 31 U.S.L. WEEK 3019 (U.S. May 24, 1962) (No. 997, 1961 Term; renumbered No. 142, 1962 Term), *prob. juris. noted*, 31 U.S.L. WEEK 3116 (Oct. 8, 1962). This Pennsylvania act was previously before the Supreme Court prior to a 1959 amendment to it. When the act was amended, the Supreme Court remanded the case to the District Court of Pennsylvania for appropriate further proceedings. For proceedings remanding the case see 364 U.S. 298 (1960).

For a history of *Murray v. Curlett*, see 228 Md. 239, 179 A.2d 698 (1962), *cert. granted*, 31 U.S.L. WEEK 3116 (U.S. Oct. 9, 1962) (No. 970, 1961 Term; renumbered No. 119, 1962 Term). See generally note 116 *supra*.

of the Court, four of these either wrote or joined in one of the separate concurring opinions, and as in *Engel*, only Mr. Justice Stewart dissented.

The Court's opinion pointed out that the *Bible* reading exercises were establishment violations since they were primarily religious and did not have an independent secnlar purpose. Moreover, the Court developed the facts to show that the practices both preferred some religions over others and created some indirect coercion to participate. Although the opinion somewhat rejected a *de minimus* rationale, it carefully pointed out that religious accommodations designed to aid the free exercise of religion are not necessarily violative of the establishment clause. The Court said in a footnote to its opinion:

> We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be nnable to engage in the practice of their faiths.[155]

Furthermore, the Court reiterated the *Zorach v. Clauson* language to the effect that there need not be a complete separation of church and state in every situation.

In a concurring opinion, Mr. Justice Douglas emphasized that the *Bible* reading practices violated the establishment clause both because "the State is conducting a religious exercise,"[156] and "for the additional reason that public funds, though small in amount, are being used to promote a religious exercise."[157]

In a lengthy concurring opinion, Mr. Justice Brennan made a comprehensive historical analysis of the religious freedom provisions of the first amendment and the cases decided under them. In addition to finding that the exercises violated the establishment clause as essentially discriminatory and coercive religious practices, Mr. Justice Brennan found that the excusal procedure itself necessarily violated the free exercise clause. Moreover, in an excellent discussion of the relationship between the free exercise and establishment clauses, he explicitly stated that not every involvement of religion in public life is unconstitutional.

> [N]othing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to allevi-

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[155] School Dist. v. Schempp, 374 U.S. 203, 226 n.10 (1963).
[156] *Id.* at 229.
[157] *Ibid.*

> ate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.[158]
>
> Such a construction would, it seems to me, require government to impose religious discriminations and disabilities, thereby jeopardizing the free exercise of religion, in order to avoid what is thought to constitute an establishment.
>
> The inescapable flaw in the argument, I suggest, is its quite unrealistic view of the aims of the Establishment Clause. The Framers were not concerned with the effects of certain incidental aids to individual worshippers which come about as byproducts of general and nondiscriminatory welfare programs. . . . I cannot therefore accept the suggestion, which seems to me implicit in the argument outlined here, that every judicial or administrative construction which is designed to prevent a public welfare program from abridging the free exercise of religious beliefs, is for that reason *ipso facto* an establishment of religion.[159]

Mr. Justice Goldberg, in a concurring opinion joined by Mr. Justice Harlan emphasized the need for judicial restraint and accommodation in this sensitive area, saying that "Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so."[160] As further illustrative of the tenor of his opinion, Mr. Justice Goldberg set out in full the "ceremonial exercise" footnote from *Engel.*

The lone dissenter, Mr. Justice Stewart, retreated substantially from his dissenting position in *Engel.* Instead of advocating an extremely limited scope for the establishment clause, he took the position that if the exercises could be shown to be inherently preferential or coercive then they would be establishment violations. Not convinced by the available evidence on preference or coercion, however, he urged that both cases should be remanded for further hearings on the facts. Mr. Justice Stewart also took a slightly different view as to the relationship between the free exercise and establishment clauses, arguing that "a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause."[161]

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[158] *Id.* at 295.
[159] *Id.* at 302–03.
[160] *Id.* at 306.
[161] *Id.* at 309.

Decided the same day as the *Bible Reading Cases* and perhaps of even greater importance, *Sherbert v. Verner* declared unconstitutional a state interpretation of the South Carolina Unemployment Compensation Act which denied unemployment benefits to a Seventh-day Adventist simply because religious scruples prevented her from working on Saturday. The act denied unemployment benefits to all persons who refused to work for purely personal reasons, and South Carolina's interpretation of the act simply treated religious scruples like any other personal reasons. South Carolina, however, in a related enactment expressly saved the Sunday worshipper from any such treatment.

In a decision with two concurring opinions and a dissent, the Court held that the practice was a violation of the free exercise clause since there was no compelling state interest to justify the infringement of appellant's free exercise rights.[162] Mr. Justice Brennan, writing for the Court, was careful to point out that although judicial action declaring such a practice a violation of the free exercise clause would in effect carve out an exception on the basis of religion, nevertheless, such an exception compelled by considerations of free exercise could hardly be regarded as an establishment of religion. Moreover, he pointed out that the secular purpose test under the free exercise clause was a very sensitive one.

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'[163]

In a short concurring opinion, Mr. Justice Douglas again rejected this secular purpose test in the religious freedoms area, although it is questionable just how far he would pursue such a rationale.

Mr. Justice Stewart, concurring in an opinion much like his dissent in the *Bible Reading Cases*, again emphasized the establishment-free exercise conflict inherent in the situation, saying that according to the Court's "wooden" interpretation of the establishment clause this case logically involved an establishment violation. In criticizing the logic of the Court in the *Sherbert* and *Bible Reading Cases*, however, what Mr. Justice Stewart seems to assume is that in any free exercise-establishment confrontation the establishment clause will prevail. In fact, since the estab-

[162] Because of the result reached under the free exercise clause, the Court did not consider appellant's equal protection claim. Interestingly, equal protection rationale would seem very close to that of the free exercise clause in many situations. Sherbert v. Verner, 374 U.S. 398, 409–10 (1963).

[163] *Id.* at 406.

lishment clause is largely designed to implement the free exercise of religion, the Court has correctly concluded that the free exercise clause will prevail. This result has been reached in the *Commonwealth* case, where the confrontation between the two clauses was initiated by an establishment attack and was thus based on legislative action, and in the converse situation of the *Sherbert* case, where the confrontation between them was initiated by a free exercise attack and was thus based on judicial action. There is certainly no logical inconsistency in this, as it is clear that the free exercise clause is and should be dominant.

Mr. Justice Stewart's second criticism of the Court is that the free exercise claim in *Braunfeld* in which the Court found no free exercise violation was even stronger than the claim in the present case and thus that the present decision is inconsistent with *Braunfeld.* Although each case presents a question of balancing the secular purpose of the law against the threat to religious freedoms and thus a comparison on different facts is difficult to make, it does seem that the secular purpose test enunciated by the Court in *Sherbert* is more sensitive than that employed in *Braunfeld.*

Mr. Justice Harlan, in a dissenting opinion joined by Mr. Justice White also felt that the present case was inconsistent with *Braunfeld.* Since he felt that *Braunfeld* presented a stronger free exercise claim than the present case, however, unlike Mr. Justice Stewart he found that there was no free exercise violation. Apparently Justices Harlan and White are not as willing as the rest of the Court to accept as sensitive a secular purpose test under the free exercise clause. But like the rest of the Court, Mr. Justice Harlan additionally explained that should a state choose to accommodate unemployment compensation laws to the free exercise of religious beliefs then nothing in the establishment clause would prevent it.

In summarizing the effect of the recent religion cases, it is apparent that the Court unanimously agrees that at least some governmental accommodations to religion which are designed to protect the free exercise of religion are permissible under the establishment clause. Moreover, and perhaps even more crucial, it is evident from the *Sherbert* case that at least seven members of the Court feel that some governmental accommodations to religion are constitutionally required under the free exercise clause, and that this requirement is to be enforced with a very sensitive secular purpose test. Thus, as a result of these recent cases it is now clear that in the words of *Zorach v. Clauson* repeatedly relied on by the Court:

> The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it

> studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter.[164]

IV. EVALUATION

A. *Purpose and Effect as Constitutional Standards*

One of the most obvious standards identifiable in establishment cases is the secular purpose rationale. That is, generally if a law is enacted for a secular purpose and has a sufficient secular effect then it is safe from attack under the establishment clause despite any incidental effect it might have on religion. Consequently, a strong secular purpose and effect are two of the most important factors in upholding legislation as constitutional against attack based upon the establishment clause. For example, the law attacked in the *Everson* case was partially enacted as a safety measure for the protection of school children going to and from school.[165] In the *Cochran* case, the act providing secular school books to public and parochial schools was a general education measure.[166] In the *Bradfield* case, the appropriation of funds to the corporation allegedly dominated by a Roman Catholic sisterhood was a general public health measure designed to assure better hospital facilities for the District of Columbia.[167] Similarly, the Court in the *Sunday Closing Law Cases* found that the "blue laws," in question were intended today to provide a uniform day of rest to enhance the general welfare of the community.[168]

On the other hand, the Court in the *McCollum*, *Torcaso*, *Engel*, *Murray*, *Schempp* and *Sherbert* cases could not find sufficient secular purposes for the laws and at the same time the Court recognized that each involved a threat to the free exercise of religion.

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[164] Zorach v. Clauson, 343 U.S. 306, 312 (1952).

[165] "But the Court found that the purpose and effect of the statute in question was general 'public welfare legislation,' . . . that it was to protect all school children from the 'very real hazards of traffic' . . . ." McGowan v. Maryland, 366 U.S. 420, 443–44 (1961).

[166] "Its [the act's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 375 (1930).

[167] "The act of Congress, however, shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation." Bradfield v. Roberts, 175 U.S. 291, 299–300 (1899).

[168] See note 120 *supra*.

Moreover, in the *Everson*, *Cochran*, and *Bradfield* situations, if the establishment clause were interpreted so strictly as to bar even incidental aid to religion resulting from a nondiscriminatory secular plan, the result would be to disqualify religious institutions from the opportunity of participating in the plan solely on the basis of religion. To disqualify religious institutions from the opportunity of participating in government programs solely on the basis of religion would impair the free exercise of religion. Clearly the establishment clause should not require such an impairment.

It seems probable that in some cases a secular purpose and effect is not sufficient to save a law if the same purpose could be effectuated in a manner not even incidentally affecting religion.[169] Although the Court adverted to this in the *Sunday Closing Law* and *Bible Reading Cases*, an analysis of the *McCollum* and *Torcaso* cases would seem to call for this same result. If it had been argued in these cases that the laws did indeed have a secular purpose and effect, they may have been unconstitutional nevertheless, because there were alternative measures which could accomplish the secular purpose, and these alternatives might have less effect or even no effect at all on religion. For instance, in the *McCollum* situation it might be argued that the state had a general educational interest in teaching about religious thought and influence. Assuming that this is true, a law teaching a non-sectarian survey of religious thought would produce the desired result without amounting to religious indoctrination.[170] Similarly, in *Torcaso* it might have been urged that the state had a general interest in securing honest and courageous officers. It would seem, however, that there are methods of achieving these ends other than religious oaths or other laws affecting religion. On the other hand, there seems to be very little alternative in protecting the safety of school children going to and from school other than to pay their transportation cost or otherwise to provide for their transportation. It remains to be seen, however, just how much discretion the government has in choosing the means to effectuate a particular secular purpose which may also incidentally affect religion.

Obviously, a secular purpose should to some extent protect a law against attack from the establishment clause. For religious beliefs and

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[169] See note 122 *supra*. *But see* Note, 28 GEO. WASH. L. REV. 579 (1960). "Again the first question would seem to be an analysis of where the legitimate interest of the state lies. Since this interest lies in providing a day of rest for all who labor, there seems to be no compelling reason why any particular day need be selected." *Id.* at 611.

[170] See note 107 *supra*.

practices permeate our whole society, and consequently, as in the free exercise cases, it would be intolerable to hold unconstitutional all secular laws which have any incidental effect on religion. In order to allow government to operate effectively, it is necessary to allow at least some laws which have a secular purpose and which only incidentally affect religion. To hold otherwise would unduly restrict government because of religion, which the establishment clause sought to avoid.

It is not clear, however, at just what point a law is or is not endowed with sufficient secular purpose to be protected against attack from the establishment clause. In the *Bible Reading Cases*, the Court declared the test to be one of a secular legislative purpose and a primarily secular effect. Regardless of the verbal test used, it would seem that in order for the secular purposes of a particular plan to be considered sufficient to uphold the plan against attack from the establishment clause, the secular ends should be great in relation to the possible harm to religious freedoms. Thus, the process of determining the constitutionality under the establishment clause of a law allegedly for a secular purpose involves a preliminary value judgment or "balancing" between the secular ends to be achieved and the threat to religious freedoms. As a result, it should not be automatically sufficient for constitutionality merely that a law has a secular purpose. For example, in the *Torcaso* situation, if the Maryland legislature had made a determination that the only method of obtaining state employees with a high level of honesty was by using the religious oath, then it would still seem that despite the secular purpose and the lack of alternatives the law would still be invalid, because the religious means chosen to effectuate this policy present too great a threat to religious freedoms. Despite the obvious difficulties in such a balancing process, some such process is inevitable if religious freedoms are to be protected and at the same time government is to function effectively.

In this regard, a more comprehensive test based on the same principles, might simply be whether the law in question constitutes governmental action on the basis of religion. If the governmental action is not taken on the basis of religion, then the law in question is constitutional.[171] Such a test has the advantage, among others, of including laws using religious means as well as laws having religious purposes. Thus, the hypothetical *Torcaso* situation presented above would clearly be governmental action

[171] See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). "[R]eligion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations." *Id.* at 5; see note 102 *supra*.

on the basis of religion. It would seem, however, that even under such an "equal protection" test, the threat to religious freedom should be taken into account, and if it is too great in relation to the secular purpose of the law, then the law should be unconstitutional. Inevitably, then, some balancing is involved. As a practical matter, though, a strict "equal protection" test would probably result in greater predictability. But whether this predictability should be achieved at the expense of free exercise is a more doubtful question.

Mr. Justice Douglas, in his dissent in the *Sunday Closing Law Cases*, has somewhat rejected a balancing test as applied to the religious freedom clauses of the first amendment.

> The Court balances the need of the people for rest, recreation, late sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious belief of another. There is in this realm no room for balancing. I [Mr. Justice Douglas] see no place for it in the constitutional scheme.[172]

But continuing, he somewhat limits this:

> The religious regime of every group must be respected—unless it crosses the line of criminal conduct. . . . That is my reading of the Establishment Clause and the Free Exercise Clause.[173]

Apparently, Mr. Justice Douglas feels that the dangers to religious freedoms are counterbalanced by traditional criminal conduct. Consequently, it would seem that by rejecting a "balancing" test, Mr. Justice Douglas only means that once certain laws are found to threaten religious freedom, *then* there is no room for balancing. The value judgment as to just what secular laws threaten religious freedom, must still be made. In practical effect, this may simply mean that he weighs the threat to religious freedoms much more heavily than the secular ends. In any event, Mr. Justice Douglas' view, which was reasserted in his concurring opinion in *Sherbert v. Verner*, results in a narrower interpretation of the secular purpose test.

In general, the secular purpose test under the establishment clause is similar to that found necessary under the free exercise clause as long ago as 1879 in *Reynolds v. United States*.[174] There is some question, however, whether the secular purpose test operates differently under the two clauses. Thus, what constitutes a sufficient secular purpose against attack

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[172] 366 U.S. 575 (1961).
[173] *Ibid.*
[174] 98 U.S. 145 (1879).

from the establishment clause may not suffice against attack from the free exercise clause. For example, in the *Sunday Closing Law Cases,* Mr. Justice Brennan and arguably Mr. Justice Stewart, concurred on the establishment issue and dissented on the free exercise issue,[175] yet both issues involved the same secular purpose. Moreover, in the *Bible Reading Cases,* the Court defined the secular purpose test for upholding a law against establishment attack merely as a secular legislative purpose and a primarily secular effect. But in the free exercise context of the *Sherbert* case, the Court speaks of the secular purpose required to uphold a law against first amendment attack as a "compelling state interest" created only by grave abuse endangering paramount interests. The actual result in *Sherbert* would affirm this high sensitivity of the secular purpose test under the free exercise clause. Possibly, then, there is a greater sensitivity to threats to religious freedoms when considering free exercise rather than establishment questions.

The secular purpose rationale as applied by the majority of the Court in the establishment cases seems broad enough to include many laws which aid religion. For example, tax exemptions for all charities including religious institutions would seem to be within the rule, although perhaps some of the existing statutes providing for such exemptions would have to be reworded in terms inclusive of all charities in order to qualify.[176] The secnlar purpose of such exemptions would, of course, simply be to encourage charitable organizations. The Court, however, has in effect upheld broad tax exemptions for religious institutions even though they were not worded exclusively in terms of charities or other non-religious classifications. Thus, in *General Fin. Corp. v. Archetto,*[177] the Rhode Island Supreme Court recently upheld Rhode Island's broadly worded religious property tax exemptions, and the United States Supreme Court dismissed the appeal for want of a substantial federal question. One of the Rhode Island tax exemptions challanged as a violation of the establishment clause provided exemptions for:

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[175] See note 27 *supra.*

[176] Most tax exemptions for religious institutions could be justified as fulfilling a secular purpose of support to charities. "Almost all tax exemptions, however, are granted to educational and charitable institutions as well as to religious organizations. Religion is not alone the object of preference in the tax statutes." Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation,* 14 LAW & CONTEMP. PROB. 144, 150–51 (1949). It could always be argued, of course, that religious institutions are not just charities in the usual sense even though the tax statutes were reworded.

[177] 176 A.2d 73 (R.I. Sup. Ct. 1961), *appeal dismissed,* 369 U.S. 423 (1962) (appeal dismissed for want of a substantial federal question).

> Buildings for religious purposes and the land on which they stand, not exceeding one acre, to the extent such buildings and land are used for religious or educational purposes; $10,000 in value of the land and buildings actually used as rectories, parsonages and the like, but not exceeding one acre; intangible personalty held in trust for religious organizations, if used for religious or charitable purposes . . . .[178]

It would seem that despite this per curiam opinion, such broadly worded tax exemptions are of doubtful constitutionality unless based on a non-religious classification. In fact, Mr. Justice Black was of the opinion that probable jurisdiction should have been noted in this case, and Mr. Justice Brennan in his concurring opinion in the *Bible Reading Cases* implied that tax exemptions for religious institutions are constitutional only if incidental to a general scheme of exemptions for charities and nonprofit organizations.

In any event, even tax exemptions for religious institutions based on a non-religious classification would directly aid religious as well as non-religious institutions. Such an effect is hardly startling. Police and fire protection, mail services, and a host of other laws providing for the general welfare have been aiding religion for years. No one would seriously contend that they violated the establishment clause. In fact, if the establishment clause were to prohibit religious organizations from the opportunity of participating in these benefits solely because they were religious organizations, arguably it would be impairing the free exercise of religion.

Another current question which is perhaps controlled by a secular purpose rationale is that of the use of Christmas trees in the public schools. Both Mr. Justice Clark's tradition breaking comment[179] and the Court's own "ceremonial exercise" footnote[180] were insufficient to deter some sweeping interpretations of the *Engel* case. In one such interpretation, several school principals in Massachusetts banned Christmas trees in the local public schools.[181] Without even puzzling over the meaning of the Court's "ceremonial purpose" footnote, it would seem likely that nothing in the establishment clause requires such a result.[182] For Christ-

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[178] 176 A.2d at 74.

[179] See note 11 *supra*.

[180] Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).

[181] See note 11 *supra*.

[182] Generally, the less effect a particular law has on religion, the greater its chance for validity under the establishment clause. For example, it could be argued that the results reached in both the *Selective Draft Law Cases* and *Zorach v. Clauson* were reached be-

mas is not only a religious holiday, but is also a national day of rest observed alike by non-believers and persons of every faith. The Christmas tree is similarly a secular as well as a religious symbol. The use of Christmas trees in the public schools merely as a symbol of holiday festivities would quite likely be constitutional under the secular purpose test of the *Sunday Closing Law Cases*. The question, of course, is always one of degree and of balancing the secular ends of the law against the possible harm to religious freedom.

A question which nicely illustrates the need for this "balancing," and one on which there has been much speculation,[183] is whether the establishment clause precludes federal aid to sectarian schools as part of a nondiscriminatory plan of federal aid to education.[184] Although the answer might depend on the details of a particular plan, it is not at all clear that a suitable plan would be barred by the establishment clause.[185] Admittedly, the effect on sectarian schools, and thus on religious institutions, might be substantial. The secular purposes and effects of such a law might also be substantial. Arguably, at a time when it is imperative

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cause the laws in question were thought to have only an insignificent effect on religion. That is, that the laws in question were thought to be essentially accommodations to religion and not aid to religion in a constitutional sense. Although the *Bible Reading Cases* somewhat reject it as a rationale, how far such *de minimus* reasoning might be carried in the future remains a mystery. It would seem, however, that a broad interpretation of secular purpose might produce substantially the same result. "Items such as the reference to God on coins are insignificant almost to the point of being trivial." Pfeffer, *Church and State: Something Less Than Separation*, 19 U. CHI. L. REV. 1, 23 (1951). "But to say, as learned counsel did, that there is no place at all for *de minimis* may turn out to be embarrassingly extreme, for the number of small instances of government support, or at least favorable recognition, of religious activity is so great and they are so pervasive that they go unnoticed until attention is drawn to them [discussing arguments in *McCollum*]." Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1343 (1949).

[183] See, *e.g.*, KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION (1962); Hayes, *Federal Aid to Church-Related Schools*, 11 DE PAUL L. REV. 161 (1962); *The First Amendment and Federal Aid to Church-Related Schools*, 50 GEO. L.J. 347 (1961). See generally for a history of proposals Mitchell, *Religion and Federal Aid to Education*, 14 LAW & CONTEMP. PROB. 113 (1949).

[184] The basic question of the constitutionality of federal aid to education or the wisdom of such federal aid to education is not here considered. It is interesting that federal aid to education *exclusively* in public schools might raise constitutional questions also.

[185] For example, it might make a difference whether the aid involved was at a secondary or college level. Arguably, such aid is closer to regulation of belief at the lower educational levels. Moreover, perhaps a greater secular purpose could be made out for aid to education at the higher levels. See generally KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 50 (1962).

that our country produce more scientists for an adequate national defense, federal aid to education, including aid to sectarian schools, is the best method of achieving the necessary results.[186] Similarly it could be argued that federal aid to all education is imperative to raise generally the educational level in the country, thereby promoting the general welfare. Furthermore, the results in both *Everson* and *Cochran* indicate that such a law would be constitutional. In both cases the incidental aid to religion took the form of aid to Roman Catholic parochial schools. Nevertheless, the laws were upheld. Finally, it could be argued that if the establishment clause precludes sectarian schools from sharing in the benefits of a plan which Congress had seen fit to extend to all schools, this prohibition would be discrimination against them solely on the basis of religion, thus impairing the free exercise of religion. Nothing in the establishment clause requires impairment of free exercise. As a result, the intent of Congress should be respected.

The congressional wisdom of such a plan might be another question. Moreover, these arguments might be subject to attack on the ground that there are alternative methods of achieving the same secular ends without incidentally affecting religion. The actual result in such a case would largely depend on a conscious or unconscious "balancing" of these secular ends against the possible harm to religious freedoms. Because of the emotional issues involved and the close nature of the question itself, it is futile to hazard a prediction of the outcome.[187]

The principal question in the above discussion is to what extent a secular purpose protects a law from an attack based upon the establishment clause. It has been concluded that a law is constitutional if it has a sufficient secular purpose. It may also be necessary to show that this purpose cannot be achieved by some alternative which does not affect religion even incidentally. It should not be concluded, however, that the converse of this proposition is true. It is not the case that all laws affecting religion without sufficient secular purpose are necessarily unconstitutional. A law may have no saving secular purpose at all, but have as its

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[186] "Today, Catholic schools—the largest of the groups of our church-related schools—are providing education, recognized by the states as meeting essential citizens' needs, to 4.5 million elementary-school children and 1 million high-school children—or around 13 per cent of the total school population of the nation." U.S. News & World Report, Dec. 25, 1961, p. 67. See also the New York Times, Nov. 12, 1962, p. 30M, col. 2. See generally *Latest in the Fight over Federal Aid to Schools*, U.S. News & World Report, Dec. 25, 1961, p. 67.

[187] In the state courts, laws appropriating public funds directly to sectarian schools have usually been held invalid. Note 60 HARV. L. REV. 793, 795 & n.23 (1947).

objective protecting the free exercise of religion. Such laws are not unconstitutional under the establishment clause. To hold that they were would unnecessarily impair the free exercise of religion.

B. *The "Establishment"—"Free Exercise" Conflict*

There is, of course, no true conflict between the establishment and free exercise clauses.[188] They appear in the same sentence in the first amendment and were largely aimed at the same evils. In some situations, however, a too strict interpretation of the establishment clause could actually result in declaring invalid laws enacted for the purpose of protecting free exercise. For example, in the recent *Commonwealth* case, the constitutionality of the Kentucky "blue laws" was challenged on grounds converse to those in the *Sunday Closing Law Cases*. The Kentucky laws exempted persons who observed a sabbath other than Sunday from the requirements of the Sunday closing laws, and instead allowed them to observe one day in each seven as a sabbath.

In a broad sense, such exemptions aid those religions which do not observe the Sunday sabbath; but even narrowly construed, such exemptions constitute governmental action on the basis of religion.[189] Consequently, there is no question in this situation of a sufficient secular purpose for these exemptions which would justify constitutionality under a secular purpose rationale similar to that used in the *Sunday Closing Law Cases*. If the establishment clause precludes all laws aiding religion without sufficient secular purpose, or even if the religious freedom clauses of the first amendment are governed in every case by a principle akin to an "equal protection" standard, we would expect these exemptions to be unconstitutional. Yet the Kentucky Court of Appeals held that the exemptions were constitutional, and the Supreme Court dismissed the challenge of the law saying that no substantial federal question was presented. This decision seems entirely correct. To declare such exemptions unconstitutional would needlessly inhibit the exercise of religion in a situation in which the legislature has declared that the secular purpose of the "blue laws" can be accomplished without interfering with the exercise of religion. In fact, in the *Sunday Closing Law Cases*, Justices Douglas, Brennan, and Stewart urged that "blue laws" without such exemptions violate the free exercise clause. It is hard to imagine, then, how laws with such exemptions could pose a threat to our religious freedoms. If the exemp-

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[188] See note 59 *supra*.

[189] See note 171 *supra*.

tions were declared unconstitutional, the Court would be in the anomalous position of declaring a law which protects the free exercise of religion as violative of the establishment clause. Such a result would be strange indeed.

The Court may have been influenced by similar considerations in several other establishment cases. In the *Selective Draft Law Cases*, Congress had determined that the secular purpose of the draft laws could be accomplished without interfering with the exercise of religion. Thus Congress provided for religious exemptions to the draft laws, which, at least in the case of exemptions for conscientious objectors, had the effect of protecting the free exercise of religion. Once again the situation is such that if the exemptions were declared unconstitutional, the Court would be in the anomalous position of declaring a law which protects the free exercise of religion a violation of the establishment clause. Perhaps this is really what the Court meant when it said: "[W]e think its unsoundness is too apparent to require us to do more."[190]

Also in *Quick Bear v. Leupp*, the Court expressly adverted to this free exercise "conflict." While considering government payment to sectarian schools on behalf of Indian beneficiaries with respect to its constitutionality under the establishment clause, the Court said:

> [I]t seems inconceivable that Congress should have intended to prohibit them [the Indians] from receiving religious education at their own cost if they so desired it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians . . . .[191]

The *Quick Bear* case, although presenting a different type of situation from those discussed above, is, nevertheless, pertinent. It seems that the Court may be more willing to uphold a law under the establishment clause if its effect is to protect the free exercise of religion. In fact, the only cases which have declared a law unconstitutional under the establishment clause, that is, *McCollum*, *Torcaso*, *Engel*, *Murray* and *Schempp*, have all involved a threat to free exercise. In such cases, the establishment clause is performing one of its most important functions by implementing the free exercise clause.

In *Scherbert v. Verner*, the Court was again squarely faced with a confrontation between the free exercise and establishment clauses. In *Sherbert* the Court held that free exercise required that Seventh-day Adventists be exempted from the strict requirements of the South Carolina Un-

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[190] Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

[191] Quick Bear v. Leupp, 210 U.S. 50, 82 (1908).

employment Compensation Act. Such exemptions, however, were clearly governmental action on the basis of religion, even though the exemptions were imposed by judicial rather than legislative action. Expressly considering the establishment clause, however, the Court found that such exemptions were constitutional and not even the dissenters disagreed with this conclusion on an establishment basis.

Clearly, at least some governmental accommodations to religion which are designed to protect the free exercise of religion should be permissible under the establishment clause. The free exercise clause will and should prevail regardless of whether the confrontation between the two clauses is initiated by an establishment attack based on legislative action as in the *Commonwealth* case, or whether it is initiated by a free exercise attack based on judicial action as in the *Sherbert* case. Such a conclusion is logically compelled, since in the final analysis there is no question of a conflict between the two clauses. It is simply a question of recognizing that both clauses are designed to maximize religious freedoms and that in particular the uniquely American establishment clause is largely designed to implement the free exercise clause. The language of the many opinions in the recent *Bible Reading* and *Sherbert* cases unanimously affirms this result.

The establishment clause certainly has other purposes in addition to implementing the free exercise clause. It is also intended to protect the church from government intervention and at the same time to insulate somewhat the government from the demands of religion.[192] By so doing, it seeks to avoid much of the civil strife which historically has arisen when religion and the state were not insulated from one another. But the free exercise clause also protects against that civil strife which historically has arisen when religion has not been free. If the establishment clause were to strike down laws protecting the free exercise of religion, it is doubtful if the cause of avoiding civil strife would be much advanced.

Of course, many laws affecting religion and not having a sufficient secular purpose could not fairly be said to protect the free exercise of religion; and in such cases, the laws are unconstitutional. Moreover, laws which protect the *free exercise* of religion should be distinguished from

[192] "It [the first amendment] was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denominatiou any advantage from getting control of public policy or the public purse. Those great ends I [Mr. Justice Jackson] cannot but think are immeasurably compromised by today's decision." Everson v. Board of Educ., 330 U.S. 1, 26–27 (1947) (Mr. Justice Jackson dissenting); see 23 U. PITT. L. REV. 222, n.1 (1961).

those which merely promote the *exercise* of a particular religion or religious belief. Almost any law favoring religion would fall into this latter category, but unless it had a sufficient secular purpose or actually protected the *free exercise* of religion, it would be unconstitutional. For example, in the *Engel* case the use of the officially written Regent's prayer in the public schools promotes the exercise of a particular religious belief. The use of the prayer, though, does not protect the free exercise of religion. In fact, strong arguments can be made that such use indirectly threatens free exercise. Because of this distinction, admittedly one of degree, the *Engel* decision under the establishment clause is in no way in conflict with the free exercise clause.

On the other hand, religious accommodations in the armed services present a situation contrary to the "prayer reading" case. Although chaplains and other religious accommodations in the armed forces may promote the exercise of religion, some such accommodations also protect free exercise. For in this situation, Congress has enacted laws requiring virtual full time service for a period of years in the armed forces. If some accommodations were not made for the exercise of religion during that period, then such a program might unnecessarily deprive persons of the opportunity to practice their religion and might thus violate the free exercise clause. But nothing in the establishment clause should be interpreted as prohibiting such accommodations. Of course, any decision as to the constitutionality under the establishment clause of a particular plan, whether in this or any other situation, would largely depend on the details of the particular plan.

An even stronger situation for constitutionality under the establishment clause is presented when a law has both a substantial secular purpose and also protects the free exercise of religion. For instance, a criminal law which provides a fine for disturbing religious worship is such a law,[193] since it not only prevents breaches of the peace, but also protects the free exercise of religion. As a result, even though it may be said to aid religion, it is certainly constitutional.

Conclusion

Since the establishment clause as presently interpreted unquestionably prohibits more than just an established church, many have questioned

[193] See ALA. CODE tit. 14, § 117 (1959). "Disturbing religious worship.—Any person who wilfully interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of worship, shall, on conviction, be [punished] . . . ." *Ibid.*

whether such a provision is desirable. The answer to this question lies in an understanding of the purposes of the clause.[194]

The establishment clause, as interpreted today, is designed as a long run measure both to implement free exercise and to prevent the civil strife resulting when government and religion interfere with one another. To accomplish these interrelated purposes, government must be prevented from officially endorsing or putting its weight behind any religious belief except on sufficient secular grounds. The command of the establishment clause, then, is a neutral one: Government shall not take sides either for or against any religious belief. Experience has shown, and an analysis of the establishment cases affirms, that whenever the state violates this command, it creates subtle and pervasive governmental pressures to conform to prevailing religious beliefs. Such a prohibition, then, provides needed protection for those religious groups whose views make them dissenters or non-believers in the eyes of the majority. Those who doubt the necessity of a broad interpretation of the establishment clause today, should bear in mind that it strengthens all of our religious freedoms against a day when the majority might become the minority.

On the other hand, the establishment clause should not be so indiscriminately applied as to impair free exercise. The establishment and free exercise clauses are largely interrelated, both in the type of situations in which they arise, and in the evils they are designed to prevent. Consequently, they should be construed together so as not to work at cross purposes. Thus, in any situation in which free exercise would be impaired by a too strict interpretation of the establishment clause, the establishment clause should be construed so as to avoid the "conflict." In particular, in situations such as are presented in the *Commonwealth* and *Sherbert* cases in which governmental accommodation for religious freedom actually protects free exercise, such accommodation is not unconstitutional under the establishment clause. By thus considering the free exercise clause whenever construing the establishment clause, the result will be more in conformity with the purposes of both clauses.

[194] See generally KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION, 1–51 (1962); KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1962); TUSSMAN, THE SUPREME COURT ON CHURCH AND STATE (1962); Cahn, *On Government and Prayer*, 37 N.Y.U.L. REV. 981 (1962); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963); Louisell & Jackson, *Religion, Theology, and Public Higher Education*, 50 CALIF. L. REV. 751 (1962); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73 (1963); *Religion and the State*, 14 LAW & CONTEMP. PROB. 1 (1949). For state constitutional restrictions in this area see MOEHLMAN, THE AMERICAN CONSTITUTION AND RELIGION (1938); 50 YALE L.J. 917 (1941).