The Establishment Syndrome and Religious Liberty

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Seventeen years have passed since the Supreme Court chose the establishment clause of the First Amendment as the preferred reed through which to breathe modern relevance into an 18th century formulation of church-state relationships.\(^1\) Prior to 1947 the Court "had seldom undertaken to supply content to that part of the first amendment concerned with separation."\(^2\) With the *Everson* decision,\(^3\) a period opened in which the commodious dimensions of the establishment concept invited the legal soul to trace out that grand design which presumably must distinguish and exalt the American understanding of the place of religion in society. Almost to a man, the Justices who have served the Court during these years have taken the occasion to set forth at length and with passion their convictions on this sensitive subject.\(^4\) Besides yielding a rich harvest

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1. U.S. CONSTITUTION Amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." While the two portions of the Amendment are participial phrases, they will be called clauses in conformance with judicial usage and popular expression.


4. One has only to consider the number of Justices for whom a "position" may be erected based upon their opinions in this field: Rutledge, Black, Frankfurter, Douglas, Brennan, Jackson, Stewart, Harlan.
for editors of Collected Papers, and feeding the rushing streams of judicial biography, the mass of words has excited an exquisite, and perhaps inevitable, confusion.

One commentator has subtitled his magnus opus treatment of the cases "authorities in search of a doctrine."\(^5\) His description of the judicial efforts after all this time is less than a ringing endorsement:

The encouraging fact is that the Court is at last searching for an appropriate rationale for the religion clauses. One should not ask that it run before it walks.\(^6\)

Another observer, whose sympathies for the difficult role which the Court performs cannot be doubted, has publicly confessed that the train of cases is a "juristic enigma."\(^7\) A member on the Court itself has recently characterized some of the legal doctrine as built on "resounding but fallacious fundamentalist rhetoric . . . "\(^8\) With due respect for the Court as an institution, and conscious of the dreary fact that much of the criticism is "ill-considered, petulant, or supercilious,"\(^9\) one may still conclude that the performance in the church-state area has been disappointingly eclectic and unsatisfying.

The sixteen words of the First Amendment which form the religion clauses divide grammatically into two prohibitions on congressional powers. One bars Congress from making any law "respecting an establishment of religion"; the other bars Congress from making any law "prohibiting the free exercise of religion." The first source of doctrinal difficulty for the Court has been its inability, despite innumerable efforts, to lay down a principled statement of the scope of the establishment clause. Another part of the exegetical complexity of the Amendment stems from the difficulty in reconciling its two parts in a unitary theory of church-state. That these two aspects of the problem are closely entwined is suggested by the consideration that both history and analysis support the single-purpose function of

5. KURLAND, op. cit. supra note 2, at 19.

6. KURLAND, THE SCHOOL PRAYER CASES IN THE WALL BETWEEN CHURCH AND STATE 179 (Oaks ed. 1963). An ironic note in the ritual insistence that people read Supreme Court opinions before they criticize them is the admission that the opinions frequently do not help to explain the result. "The opinions do reveal a groping for doctrine that should be applied, but it cannot be said that the search has been crowned with success." Id. at 158.


the Amendment: the preservation of religious liberty. At a minimum it may be assumed that each part of the Amendment must serve that ultimate end with due regard for the thrust of the other part.

In the last term of Court, two major issues relating to the presence of religion in public life were brought before the Court under the two clauses of the Amendment. In a case testing the constitutionality of bible-reading in public schools, the Court found an establishment of religion. In a case challenging the exclusion of a Sabbatarian from unemployment compensation benefits where his religious convictions impeded his availability for work, the Court found a violation of free exercise rights. Paradoxically one state was found to breach the Amendment because it failed to take cognizance of religious differences of its citizens, while two other states were judged in violation because they did consider the factor of religion.

The plan of this article is to explore the bases for these two decisions as a prelude to an investigation of the interrelationship of the non-establishment and free exercise clauses. Part of that investigation will entail an analysis of the several approaches which the Supreme Court has used in defining the establishment concept. A final section presents an alternative perspective from which the meaning of the Amendment may be viewed.

THE BIBLE-READING CASES

Murray

One of two cases before the Court on Bible reading in the public schools came up on the pleadings when the Maryland Court of Appeals approved the trial court's sustaining of a demurrer by the defendant board.

Since 1905, the Board of School Commissioners of Baltimore City had prescribed through rule that school open each day with "the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it." "Patriotic exercises" were also required as part of the opening exercises. In 1960, the rule was amended to provide: "Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian."

Through a writ of mandamus, the petitioners—a 14-year old student and his mother sought to compel the Board to rescind the rule, alleging violations of the religion clauses of the First Amendment and the due process and equal protection clauses of the Fourteenth. According to the petition, the practice under the rule has been to read from the King James version of the Bible, and until the adoption of the amendment, the pupil had been required to attend the program and recite the Lord's prayer. After the change in 1960, the plaintiff-minor was excused at the request of his mother. Claiming that the enforcement of the amended rule threatened their religious liberty as atheists, the plaintiffs asserted a subjection of their “freedom of conscience to the rule of the majority,” and objected to the rule's equation of moral and spiritual values with those of religion, thereby rendering “sinister, alien and suspect the beliefs and ideals of your petitioners, promoting doubt and question of their morality, good citizenship and good faith.”

In specific reference to the amendment requiring child excusal at parental request, the complaint charged that the exercise of such exemption caused the child “to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult.”

An interesting aspect of the state court opinion rejecting the petitioners' claims, over the dissent of three judges, is the almost palpable effort to intuit a result in the absence of any clear guidance in precedent. The majority thus locates the First Amendment issue as falling “somewhere between the decision in McCollum and that in Zorach,” the two cases bracketing the zone of legal significance in the released time programs of religious instruction. After characterizing the McCollum result as based on a prohibited utilization of the school system to aid religious groups in the spread of their faith through instruction classes, the Maryland court emphasized the lack of compulsion to participate in the Bible reading exercise. On the claimed denial of equal protection, the Court answered that “the equality of treatment which the Fourteenth Amendment affords cannot and does not provide protection from the embarrassment, the

15. Id. at 699-704.
16. Id. at 705.
17. Id. at 702. The decision was rendered prior to Engel v. Vitale, 370 U.S. 421 (1962).
18. The school program under attack was placed in the same category “as the opening prayer ceremonies in the Legislature of this State and in the Congress of the United States, in the public meeting and conventions which are opened with prayers or supplications to God, and in the formal call of court sessions by the crier in State and Federal courts.” Id. at 702.
divisiveness or the psychological discontent arising out of non-conformance with the mores of the majority."

Interpreting the same Supreme Court authorities as had the majority, the dissenting opinion reached a different result. The challenged program was plainly a Christian religious exercise, and therefore deemed a favoring of one religion against others, and against non-believers in any religion. In light of the Supreme Court's insistence that the establishment clause be given a broad interpretation, the minority concluded that the McCollum decision controlled, and the state was engaging in an improper aiding of religion. This conclusion was reinforced by what the minority thought constituted the dual coercive effect of the program. As far as the establishment of religion was concerned, the coercive element was the requirement that the child affirmatively seek an exemption from participation when his attendance at school was compelled by law. In regard to the free exercise problem, the objectionable feature was the burden placed on a person who wanted an exemption to profess a disbelief in religion. The minority feared that the individual might be thus pressured into subordinating his convictions on religion to the desire to remain popular with the group.

Schempp

In contrast to the pleader’s allegations of the Murray case, and its barren record, the second case before the Supreme Court offered details of the Pennsylvania program developed at trial and in a second hearing consequent upon an amendment of the state statute. In this instance, a three-judge statutory District Court had held a Bible-reading program in violation of the establishment clause.20

The original action in the Schempp case challenged a Pennsylvania statute which provided for the reading of “at least ten verses from the Holy Bible” without comment at the opening of each school day.21 No reference was made to any exemptions from the reading and teachers who failed or omitted to perform the task were to be discharged “upon charges preferred for such failure or omission, and proof of the same.”22 Outside of the statutory mandate, the practice of reciting the Lord’s prayer after the Bible reading had been followed for some 30 years. Following a decision that the statute and practice violated both the establishment and free exercises clauses

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19. Id. at 704.
of the First Amendment, as applied to the states through the Fourteenth Amendment, the statute was amended. In its revised form, the statute permitted a child to be excused from the reading, or attendance at it, "upon the written request of his parent or guardian." The provision relating to discharge of a defaulting teacher was dropped, though, as the special District Court noted, the existing statutory grounds for terminating a teacher's employment contract included "persistent and wilful violation of the school laws."

According to the evidence, children in the senior high school reported to their homerooms at 8:15 a.m., and shortly thereafter the verses from the Bible were read over the public address system. Then the children stood and repeated the Lord's Prayer under the direction of the voice on the speaker. Next followed the Flag Salute, while the children were standing, and finally the reading of school announcements. Students then dispersed to their various rooms for the first classes of the day. In the Senior High School, the readers were members of a Radio and Television Workshop, and were given the privilege of choosing the verses for that day and the particular text to be employed. At one time or another, the King James and Douay Version of the Bible was used, and the Jewish Holy Scriptures.

The plaintiff Schempps, who are Unitarians, objected particularly in the original action to the purveying by the reading of religious doctrine which they could not accept, specifically the Divinity of Christ, the Immaculate Conception, and the concepts of an anthropomorphic God and the Trinity. Except for Ellory, however, the oldest child who was dropped from the second action, no complaint had

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24. A per curiam opinion of the Supreme Court, on the appeal from the original decision, vacated the judgment and remanded the case for further proceedings under the amending statute. 364 U.S. 298.
27. In the original action, the Superintendent of Abington Township Schools testified that only the King James version of the Bible was purchased by the school, and that one copy was issued to each school teacher. Schempp v. School Dist., 177 F.Supp. 398, 400, n.10 (1959). This practice apparently was followed in the lower grades where the school was not equipped with a public address system, and the reader's job fell upon the teacher or a student selected or volunteering for that purpose.
28. Plaintiffs in the original action included the parents and three children ranging in educational level from seventh grade to senior school. The oldest child had graduated from senior high school by the time the second suit arose, and the supplemental complaint amended him out of the action.
ever been made to the school officials by the Schempps. After the statute was revised to provide for excusals, Mr. Schempp decided not to take advantage of the new provision because of his apprehension that the children would be labeled as "odd balls", or the religious views of his family would be associated with atheism or Communism. Furthermore, he feared that the morning absence would cut the children out of the announcements pertaining to school activities, which followed the Bible reading, and relegate them to standing outside the homeroom, a locale and posture implying they were being punished.

The expert testimony introduced at the first trial came from two theologians and religious leaders engaged in work on the Jewish and Christian Bibles. The first, a rabbi, pointed out the offensive nature of the New Testament to Jews and stated the lack of comment with the reading made it probable that psychological harm would be done to the Jewish child. He also explained that the Jewish Holy Scriptures are materials for study and no significance is attached to the mere reading of the Bible in Jewish thought. The witness for the defendants, Dean Emeritus of the Yale Divinity School, expressed the conclusion that the Bible was non-sectarian, which he later explained to mean non-sectarian within the Christian faiths. While including the Jewish Holy Scriptures within the term "Holy Bible," he contended that the reading of Scriptures without the New Testament would constitute sectarianism.

In its initial decision, the three-judge court found both violations of the no-establishment and religious freedom clauses. The establishment was found in the reading of a patently religious book, which under the circumstances of the program, constituted an aid to all religions (in that it dealt with man's relationship to God) and a preference of the Christian religion (since the "holy Bible" is a Christian document). In this regard, the McCollum case was thought controlling. In regard to the free exercise claim, the court found the conduct compelled for both teachers and students, though no express provision was made for sanctioning students who refused to participate. The inculcation of the religious beliefs contained in the readings, however they might be received in the minds of various children, would also intrude upon the rights of parents to determine the desired religious or nonreligious formation of the child.

29. Ellory had resisted the program by reading the Koran during that time, and refusing to stand for the Lord's Prayer. On seeing the Vice-Principal, he was permitted to spend this period in the Guidance Counsellor's office during part of one year. The following academic year, however, he was refused permission to absent himself. All of this took place before the amendment of the statute, Schempp v. School Dist., 177 F.Supp. 398, 401 (1959).
Amendment of the statute by the General Assembly of Pennsylvania did not change the plaintiff's dual theory of violation, but the district court in its second decision chose to rely only on the establishment claim. The McCollum premise that religion and government best achieve their aims if "left free from the other within its respective sphere"\textsuperscript{30} still compelled the striking down of the program in the court's view. Reverting to the wall of separation metaphor, the court detected a breach in the state's requirement compelling the reading of a Christian document, in a devotional atmosphere, in public school buildings.

\textit{Opinion of the Supreme Court}

One of the criticisms of the \textit{Engle} case, the immediate ancestor of the Bible-reading cases, was the total lack of citation to precedent in the majority opinion. Almost as if he were mounting a fresh campaign to set doctrine straight, Justice Clark for the majority in \textit{Schempp}\textsuperscript{31} proliferates the references to past cases and a variety of legal issues. But no serious effort is made to integrate past learning. Rather the net effect is a patchwork quilt of dicta which scarcely helps to bring any recognizable pattern to the subject-matter. This is not to say that the result was unexpected or novel, for \textit{Engle} clearly foreshadowed the conclusion. But the Clark summary of existing law is so preoccupied with pasting the past together in one coherent whole that it never bothers to analyze or explain inconsistent and conflicting elements. In short, granting the disposition of the immediate problem posed for its judgment, the Court does not noticeably improve the raggedness of doctrinal formulation in this area.

A concept of state neutrality in the relationship between man and religion is the organizing construct of the majority opinion. After several references to the religious composition of American society,\textsuperscript{32} Justice Clark asserts two propositions previously established by Supreme Court decisions which define the reach of the First Amendment. The first relates to the applicability of the provisions of the Amendment to the states, through the Fourteenth Amendment, and is dated as of 1940 with the decision in \textit{Cantwell v. Connecticut}.\textsuperscript{33} The second represents the rejection of the interpretation which makes

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\item[-] 32. The opinion notes, e.g., sixty-four per cent of the American people have church membership, with 3 per cent professing no religion whatever; eighty-three separate religious bodies number over 50,000 adherents, with numerous smaller groups. 374 U.S. 203, 213-14.
\item[-] 33. 310 U.S. 296 (1940).
\end{itemize}
establishment equivalent to governmental preference for a particular religion. The words of *Everson v. Board of Education* are repeated:

(n) either 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.\(^3\)

While these propositions had not been challenged in the instant cases, Justice Clark admits, “others continue to question their history, logic and efficacy.”\(^4\) For those of a skeptical mind concerning the now orthodox view, a chilling ipse dixit falls:

Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.\(^5\)

A canvass of the decisions since 1940 is undertaken to limn with selective quotation the substance of the ban on religious establishment in its First Amendment context. The distinction between freedom to believe and freedom to exercise religious imperatives, set down in *Cantwell*, is offered as a comment upon the interrelationship of the establishment and free exercise clauses.\(^6\) The *Everson* case is employed to emphasize the neutral position of the state in the matter of religious belief, for “state power is no more to be used so as to handicap religions, than it is to favor them.”\(^7\) From the dissenters in *Everson* is crystallized the meaning of this neutrality as it affects public education, since the policy which recognizes the permissibility of religious observance simultaneously forbids the state aiding in performing that function, which must then officially be considered a private function. The First Amendment is a requirement not merely of equal treatment, but of an abstention from fusing the diverse functions of government and religion,\(^8\) so that the Government does not become involved in religious conflicts. While there must be common sense of the matter, in the words of Justice Douglas the separation of church and state must be complete and unequivocal in the manner and ways defined in the Amendment.\(^9\) This requires

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34. 374 U.S. 203, 217, (1963), quoting from the 1947 decision, 330 U.S. 1, 15.
36. Ibid.
37. This interpretation some would consider a misapplication of the *Cantwell* teaching. See the Brennan characterization of this duality as a description of the meaning of the free exercise clause alone, 374 U.S. 203, 253-54 (concurring opinion).
38. 330 U.S. 1, at 18 (1947).
a broad interpretation in the light of history and the evils against which the Amendment was designed. Such an interpretation brings non-believer as well as the believer within the protection of the Amendment as far as state action is concerned. The state therefore may not get into the business of composing official prayers, since the "first and most immediate" purpose of the establishment clause "rested on a belief that a union of government and religion tends to destroy government and to degrade religion." As a practical consequence of this learning, the operation of the establishment clause cannot be made to depend upon the direct coercion of individuals nor a showing of direct governmental compulsion.

With this discursive review of prior cases as a background, Justice Clark turns to a summing up of the First Amendment's scope. "Neutrality" stems from the Court's recognition of two factors: 1) the danger of a fusion between government and religion "or a concept or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies."; 2) the value of religious training, teaching and observance and "more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." The former element is, of course, the area for application of the establishment clause, while the latter evokes the guarantees of the free exercise clause. Since the two clauses may overlap, some statement of their ultimate jurisdiction is necessary. In general, the establishment clause withdraws all legislative power respecting religious belief and its expression, while the free exercise clause withdraws from legislative power the exertion of any restraint upon the free exercise of religion. But what are the tests by which the essence of the dual prohibition is discovered? The validity of legislation under the establishment clause is determinable so:

...what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

44. Ibid.
45. Id.
On the other hand, the free exercise clause measures challenged legislation under a standard of coercion: it must be shown that the enactment has a coercive effect as it operates against the individual in the practice of his religion.

Applying the establishment test to the Bible reading program before the Court, Justice Clark notes that the exercises are prescribed for students required by law to attend school and held in buildings under the supervisions of state employees, the teachers. The religious character of the exercise is patent. In the Schempp case, the lower court had so found; in the Murray case, not only could the demurrer be taken as an admission of that fact, but on the merits the facts disclose that the Bible is being utilized as an instrument for religious purposes. The excusal provision is irrelevant since the charge is Establishment.

A measure of the failure of the opinion to illuminate the recesses of doctrinal opacity may be found in the fact that ultimately the Court seems to accept the way of formulating the issue which the Court of Appeals of Maryland used. The matter was "somewhere between McCollum and Zorach." And this particular opinion does not offer much by way of explanation of the result other than the view that the Bible Reading program lies closer to McCollum.

Each of the three concurring opinions manifest a distinct and different attitude toward the issues. Justice Douglas reiterates the very narrow ground of state expenditure which he would make an auxiliary touchstone for the determination of establishment. No matter how small the amount of state funds which can be isolated for purposes of allocating a cost, it would constitute a violation of the First Amendment since it would give "any church, or all churches, greater strength in our society than it would have by relying on its members alone." By contrast, the opinion of Justice Goldberg, in which Justice Harlan joins, takes a broad, almost philosophical, tone toward the problem. The task of assessing neutrality is a difficult one, for the basic purpose of the constitutional standard "is to promote and assure the fullest possible scope of religious liberty and

46. See text at not 17, supra.

47. Undoubtedly it does. The factors of school premises, involvement of teacher, and minute financial cost to the state all are present here and in McCollum as they were not in Zorach.

48. The lengthy concurrence of Justice Brennan, School Dist. v. Schempp, 374 U.S. 203, at 230 (1963), is a major effort to state his own church-state philosophy, including a comprehensive discussion of the past decisions. References will be made to the arguments of this opinion throughout this article.

tolerance for all and nurture the conditions which secure the best hope of attainment of that end.\textsuperscript{50} The Constitution would prohibit the type of passivity which amounts to hostility for religion, and any attempt to avoid the delicate judgment necessary to determine what the "required and permissible accommodations between church and state,"\textsuperscript{51} in the quest for simple and clear measures of judgment, would be a disloyalty to the ultimate objective of religious liberty.

The dissent of Justice Stewart is a root disagreement with the prevailing view on the meaning of neutrality as a harmonizing concept between establishment and religious freedom. Accepting the applicability of the establishment clause to the states, he nevertheless emphasizes that the central value embodied in the First Amendment is the individual freedom to exercise his religion free of state interference. He then argues that a free exercise claim of some substance is open to those who desire to have the school day open with Bible reading, as well as those who do not.

For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage.\textsuperscript{52}

True neutrality would require permission for these exercises, as long as the conditions under which the program was implemented did not result in coercion of those who object.

The constituent questions which such an approach pose are handled one by one. First, the legislation at issue must be presumed to permit the substitution of different sets of religious readings in conformance with requests of parents. In this regard Justice Stewart relies on the absence of any indication that such requests would not be acted upon by the administrators of the program, and the variations in readings revealed in the facts of the \textit{Schempp} case. Second, and assuming the flexibility regarding the material to be read, the structure of the school environment must be such that no pressures are put upon any child to participate in the exercise. Thus a program without excusal provisions would obviously be invalid. But even with excusal provisions, if the exercises were held during the school day some equally desirable alternative must be available for students who choose not to participate, so that psychological compulsion would not result in unwilling compliance. Specifically, Justice Stewart men-

\textsuperscript{50} Id. at 305 (concurring opinion).
\textsuperscript{51} Id. at 306 (concurring opinion).
\textsuperscript{52} Id. at 313 (dissenting opinion).
tions the possibility of holding the exercises before or after school for those children who desire to participate: as an example of compulsion under an excusal program, he mentions the possibility that the timing of school announcements after the religious program would induce children to attend the entire exercise in order not to miss the announcements.

Under the dissenting view, the records in both cases are inadequate for purposes of a decision, and both should be remanded for further proceedings in regard to the aspect of coercion. At the end of the opinion comes a major concession on the practicality of the approach:

It is conceivable that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate.53

**THE UNEMPLOYED SABBATARIAN**

While the Bible-reading cases centered on the establishment clause of the First Amendment, *Sherbert v. Verner*54 was decided on the other element in American church-state formulation, the right to free exercise of religion. Broadly stated, the issue concerned the unemployment compensation claims of a Sabbatarian who was deprived of work by her religious convictions when a six-day week went in effect in local textile mills.

Under South Carolina statute, an unemployed insured worker is eligible for compensation benefits only if “he is able to work and available for work.”55 Such a person is disqualified from some or all the benefits, moreover, if “he has been discharged for misconduct connected with his most recent work”56 or fails “without good cause . . . to accept available suitable work when offered him. . . .”57 In determining the suitability of the work offered the individual, the state Commission is directed to consider “the degree of risk involved to his health, safety and morals. . . .”58

The claimant in the Sherbert case had worked for a textile Mill in South Carolina for some 35 years. In 1957 she became a member of

53. *Id.* at 320 (dissenting opinion).
56. *Id.* sec. 68-114 (2).
57. *Id.* sec. 68-114 (3) (a).
58. *Id.* sec. 68-114 (3) (b).
the Seventh Day Adventist Church, which teaches that the Sabbath begins at sundown Friday and ends at sundown Saturday. In 1959 her employer changed the hours of all work shifts and so made Saturday work mandatory where it had previously been on a voluntary basis. After failing to report for six consecutive Saturdays, she was discharged. Attempts to obtain acceptable work in other mills proved unsuccessful, since textile plants in the area were generally on a six-day week, and a claim was filed for unemployment compensation.

A claims examiner found that at the time of discharge the claimant was unavailable for work, and further that she was not at the time of the hearing available for work in the textile industry in that area. A disqualification of five weeks ineligibility was imposed under the terms of the statute. Two appeals within the administrative agency proved unavailing. The ruling of disqualification was upheld by a common pleas court and ultimately came to the Supreme Court of South Carolina.

The state supreme court, with one judge dissenting, pitched its decision on the factor of statutory construction, agreeing with the Commission that the claimant did not qualify under the law since she was unavailable for work.\(^59\) Religious motivation for refusing to accept work which required Saturday employment was in effect deemed not a "good cause." The policy statement of the statute revealed the basic purpose of the legislation to be protection against economic insecurity due to involuntary employment. From this perspective, the reliance by the claimant on personal reasons for her failure to retain (or accept) employment in the mills became immaterial. Eligibility for benefits should be tested by "whether or not the claimant is actually and currently attached to the labor market, which in this case is unrestricted availability for work."\(^60\) Citing other cases, both from South Carolina and other states, the court emphasized that the concept of availability, upon which the benefits hinged, was not subject to qualification by personal conditions imposed by the applicant. Just as a mother who is unable to work certain shifts because of problems in obtaining a baby-sitter during that time may not claim unemployment benefits, so the petitioner by accepting the responsibilities of membership in the Seventh Day Adventist Church could not vary the requirement of availability essential to qualify under the statute. Against the claim that such an interpretation violated religious freedom, the state court contented itself with a summary denial; it also suggested that the allowance

60. Id. at 741.
of compensation might constitute discrimination in favor of persons motivated by religious beliefs.\textsuperscript{61}

\textit{Opinion of the Supreme Court}

Where the state court opinion was predominantly a confrontation of the complexities of statutory construction, leaving for a passing reference the constitutional claims, the Supreme Court opinion was grounded in a consideration of the imperatives of the free exercise clause. As Justice Brennan, writing for the majority, framed the constitutional standard, the disqualification imposed on the appellant occasioned by her religious convictions could be justified only if it represented no restraint on her free exercise of religion, or if such restraint was justified by some compelling state interest.

That the disqualification imposed a burden upon religious exercise required little argument for “the ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”\textsuperscript{62} The circumstances that the restraint was achieved through withholding a benefit or privilege, rather than through direct action by the state, was held immaterial in view of the importance of the constitutional rights at stake. Just as the state may not condition a tax exemption on loyalty oaths which may discourage the exercise of free speech, so is it limited in coupling a welfare benefit with standards which effectively penalize free exercise of religion. Justice Brennan notes that the state statute protects the conscience of the Sunday worshipper by a provision that employees who refuse during time of national emergency to work Sunday shifts authorized by the state commissioner of labor shall not lose their seniority.\textsuperscript{63} Thus, he argues, the burden placed on the Sabbatarian by the compensation statute is practically avoided for

\textsuperscript{61} The dissenting opinion in the state court challenged the soundness of the construction given the statute by the majority and the commission. He thought the constitutional issues raised by the petitioner tenable enough to demand more consideration than they had received. To distinguish prior cases in which inability to work resulting from personal factors had disqualified claimants, the dissenter pointed out that the employer, not the employee, had made the critical change in this case. Since the applicant was available to continue the work she had been doing prior to the change in work schedule, the question became whether the work now offered was “suitable” work. In this connection the dissenter thought a relevant provision in the status was the requirement that the commission consider the degree of risk to morals involved in a particular job. Id. at 746-53.


\textsuperscript{63} S.C. CODE sec. 64-4 (1952).
the Sunday worshipper, and a note of religious discrimination introduced.

Turning to the possibility that a state interest of sufficient magnitude might justify the infringement of religious freedom which is present, Justice Brennan considers the contention that fraudulent claims based of religious affiliation may multiply, sapping the compensation fund, if exemptions must be made on these grounds. A further consideration is the difficulty employers may experience in scheduling Saturday work, if Sabbatarians are to be accommodated. But neither of these arguments had been made in the lower court, and the Court is dubious of their merit. Justice Brennan refers to the difficulties in an approach which would require judicial probing of the truthfulness of religious affirmations of claimants. Beyond that, the possibility of deception in claims would still necessitate establishing that no alternative methods (other than disqualification of applicants) would serve to remedy that problem.\footnote{64}

The opinion of the majority is closed with a customary note in the church-state field, a denial that certain implications may be found in the result. Justice Brennan first denies that the holding of the majority "establishes" the Seventh-day Adventist religion in South Carolina. Neither does the Court purport to say anything about whether the state must provide these types of benefits to all classes of citizen \textit{ab initio}. The decision is merely that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."\footnote{65}

A final refuge is sought in a principle enunciated in Everson, that no State may exclude from welfare programs members of any category of religious or non-religious convictions "because of their faith, or lack of it."\footnote{66}

Justice Stewart, who in lonely dissent has resisted the flowering of the no-establishment theory as developed in past opinions, seized this

\footnote{64. The Sunday Closing Law Cases, 366 U.S. 420 (1961), present an obvious analogy to the \textit{Sherbert} issue in terms of the free exercise claim. The majority distinguishes these cases on the ground that the state had a strong interest in providing one uniform day of rest, a factor which has no counterpart in \textit{Sherbert}. The burden imposed upon Sabbatarians by the requirement he stay closed on another day of the week is considered "less direct" than the denial of unemployment payments, an assertion which draws the fire of Justice Stewart, School Dist. v. Schempp, 374 U.S. 203 at 417 (1963), (concurring opinion) and Justice Harlan, at 421 (dissenting opinion).}

\footnote{65. 374 U.S. 398, 410 (1963). Justice Brennan takes the precaution to remark that the case does not concern religious convictions which make believers non-productive members of society.}

\footnote{66. 330 U.S. 1, at 16 (1947).}
occasion in concurrence\textsuperscript{67} to illustrate what he believes is a “double-barreled dilemma” of judicial reasoning:

Because the appellant refuses to accept available jobs which would require her to work on Saturdays, South Carolina has declined to pay unemployment compensation benefits to her. Her refusal to work on Saturdays is based on the tenets of her religious faith. The Court says that South Carolina cannot under these circumstances declare her to be not “available for work” within the meaning of its statute because to do so would violate her constitutional right to the free exercise of her religion.

Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite result. If the appellant’s refusal to work on Saturdays were based on indolence, or on a compulsive desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not “available for work” within the meaning of its statute. That being so, the Establishment Clause as construed by this Court not only permits but affirmatively requires South Carolina equally to deny the appellant’s claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed.\textsuperscript{68}

Indicting the establishment decisions as mechanistic and empty rhetoric, Justice Stewart calls for “an atmosphere of hospitality and accommodation to individual belief or disbelief.”\textsuperscript{69}

The implications of the decision are disturbing to the two dissenters, Justices Harlan and White. They locate the essence of the majority holding in the requirement that states carve out exceptions based on religion for those who would otherwise be unable to participate in the welfare programs. Conduct motivated by religion is thus singled out and given special attention, although individuals who for any other reason cannot comply with the welfare standards are dis-

\textsuperscript{67} In a separate concurrence, Justice Douglas strikes a characteristic note by finding the problem a simple one, and the answer, certain. He finds an interference with the individual conscience since South Carolina is requiring Sabbatarians to conform with the “scruples of the majority” to obtain public benefits. While the individual may not demand a sum of money from government to support his religious beliefs, neither can the government “exact from me a surrender of one iota of my religious scruples.” Sherbert v. Verner, 374 U.S. 398, 412 (1963). The reason that the result does not constitute an establishment in the Douglas view is that the money goes to an unemployed worker and not a religious organization.


\textsuperscript{69} Id. at 415-16 (concurring opinion).
regarded. Justice Harlan refers to the suggestion that such singling out of religion may itself exceed constitutional limitations, but expresses the view that the state might as a "permissible accommodation of religion" grant such an exemption. The minority, however, object to requiring this "direct financial assistance to religion" as a constitutional right.\(^7^0\)

**EVALUATION OF THE CASES**

Doubtlessly, sophistication in the law is manifested by the ability to detect critical degrees and shades of difference between one situation and another, and thus mark the boundaries of rules. The Court, however, assuming that it wisely exercised its function in reaching the results announced in *Schempp* and *Sherbert*, has been saddled with the additional duty of explaining through its opinion the reasons why a particular conclusion is legally sound. A striking feature of the two decisions under scrutiny, which appeared the same day from the hand of the same Court, is the seeming diffidence of the majorities to face up to what are some interesting, if not insoluble, problems of reconciliation. The Court almost displays the same woodenness about the relationship of the two cases as the judge in the story of Justice Holmes. A Vermont justice of the peace had a case before him in which one farmer sued another for breaking a churn. "The Justice took time to consider and then said that he had looked through the statutes and could find nothing about churns and gave judgment for the defendant."\(^7^1\) In somewhat the same way, the Supreme Court acts for all practical purposes as if the establishment issue of the *Schempp* case had nothing to do with the free exercise issue of *Sherbert*. Yet a stranger unexposed to the subtleties of Church-state jurisprudence might justifiably ask for a statement of why precisely the state was required to pay compensation claims of a person because of his religious beliefs, and condemned for sponsoring a Bible-reading program because of its religious content.

It is true, of course, that the judge in Holmes' parable was seduced by the factual differences between the case before him and others in the books, while the Supreme Court had in tandem cases that under past doctrine evoked different legal rules. Yet these are merely two different forms of the ultimate problem of subsuming situations that are basically similar under a common legal principle and distinguishing others that are not. The Vermont justice could not see the single legal rule that governed because he was hypnotized by the physical object of dispute. The Supreme Court, on the other hand, appears

\(^{70}\) *Id.* at 423 (dissenting opinion).

ready to blink away the great factual similarities in the two cases because it is bewitched by the variance in legal formula under which they are presented.72 But why does the Bible-reading situation qualify as an establishment issue rather than one of free-exercise? Why is Sherbert a question of free exercise rather than establishment? The inquiries are not directed to the technical questions of what issues the parties raised or preserved in these cases. Nor are they intended to challenge the consistency in application of precedents which have followed the same distinction in resolving other matters. The question being raised goes deeper, by way of asking how the two clauses of the First Amendment interlock and relate, and jointly serve the purposes of religious freedom.

To be sure, each of the majority opinions takes the occasion to deny flatly that the Court is violating the other clause of the First Amendment by finding a violation of the clause with which it is dealing. Justice Clark dismisses the contention, urged by the dissenter Justice Stewart, that the elimination of Bible reading from public schools interferes with the rights of a majority to exercise freely their religion.

... [W]e cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.73

Similarly, Justice Brennan rejects any claim that the Seventh Day Adventist religion is being established by his opinion in the Sherbert case, though the single basis for requiring payment of compensation is a religious reason.

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent

72. The law purifies and refines its doctrine not only by absorbing common factual situations under one legal rule or principle, but also by recognizing that separate legal rules that create friction in case decisions when applied to a succession of factual settings may themselves require integration or harmonization by a supervening standard.

that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.\textsuperscript{74}

Are these disclaimers any more than assertions that "the law says nothing about churns"? Isn't the petitioner in \textit{Sherbert} using the compensation "machinery" of the state to practice his beliefs, and won't the state require that he implement his claim by practicing his religion if he hopes to keep his exemption? On the other hand, why does not the voluntary Bible-reading program represent "nothing more than the governmental obligation of neutrality in the face of religious differences"? These inquiries are not raised to challenge the results of these decisions but to seek understanding. As a matter of principle, why should the state be constitutionally required to recognize the factor of religious belief in the allocation of one public benefit (unemployment payments), and constitutionally prohibited from acknowledging religious convictions in another (public schools).

Is this last statement of the question an adequate one, however? An immediate objection which occurs is the characterization of the Bible-reading program as only a recognition of existing religious belief. When a state requires its teachers to begin the class with such an exercise, the objection might run, it is no longer merely acknowledging claims of individual students as to religious conviction but is now taking an active role in implementing those convictions. One is tempted to go further and say that the state is compelling the religious observance, but the immediate reservation which is called for—indeed the one element in both the Regents prayer and the Bible reading which creates enormous analytical difficulty—is that the programs are voluntary as to student participation.\textsuperscript{75} The nub of the reluctance to designating the state action as recognition, then, is the fact that the state ordains the holding of the exercise, that it requires that the reading take place whether anyone chooses to participate or not, and that its agent teacher participates. But as thus constituted, how does the Bible-reading differ from the provision for exemption from disqualification which the \textit{Sherbert} case imposes upon state compensation programs? Justice Brennan refers to the numerous state court and administrative rulings which have qualified persons for compensation benefits who because of religious convictions have re-


\textsuperscript{75} The Court accepts as a fact in the case the quality of voluntariness, its conclusion being that excusal provisions furnish no defense to an establishment claim. School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963). In the \textit{Regents Prayer Case}, where class recitation of a non-denominational prayer composed by state officials was declared an establishment, Justice Douglas emphasized the freedom of the student to refuse to take part. Engel v. Vitale, 370 U.S. 421, 438 (1962) (concurring opinion).
fused available work. Such rulings represent official governmental actions which ordain the granting of concessions designed to permit individuals effectively to exercise their religious freedom. The state does not require that individuals take advantage of these provisions and thus implement their religious convictions, but then neither does the state make such a requirement in the Bible-reading situation, either, under the assumptions of fact mentioned above.

One outstanding difference, though, is the guidance (if not personal participation) by the teacher in the spiritual exercise of the school. The teacher is there at the front of the class and she is a focus for organization and performance of the ritual. The situation is quite different, presumably, in effectuation of the compensation scheme. The exercise of religious conviction on the Sabbath or some other day does not occur on public premises. Neither is it lead by a state officials. Are these material differences in distinguishing the two involvements on the basis of principle? Would it make any difference if the clerk in the claims office routinely asked whether the unavailability of the worker was related to a religious reason? Would it take the sting out of the Bible-reading program if the teacher was not permitted to assist, and the children would meet by themselves at some predesignated room in the school?

In exploring these matters, one must be careful not to become a victim of his method of phrasing the issue. Suppose, for example, that the Sherbert issue arose as a result of the state of South Carolina writing into its statute an express exemption from disqualification for all unemployed who for religious reasons were unable to work on certain days. Would such deliberate legislative concern for the integrity of the individual conscience constitute a use of the apparatus of the state to help someone practice his religion? Would it differ in any important respect from an attempt to accommodate diverse


77. In his concurring opinion in Schempp, Justice Brennan expresses the view that excusal provisions necessarily operate to infringe the free exercise of religion because they require a student to profess publicly his belief or disbelief. School Dist. v Schempp 374 U.S. 203, 288-89 (1963). Would that also be true in a compensation program if the applicant must request the exemption from disqualification based on religion? Note by way of contrast the fear of special treatment based on religious affiliation as expressed by Justice Jackson in Everson v. Board of Educ., 330 U.S. 1, 25 (1947) (dissenting opinion) and Justice Rutledge in the same case at 61, n.56 (dissenting opinion).

groups who wish to have their children pray during the school day in a public school?

By way of contrast, suppose the Commonwealth of Pennsylvania passed a law specifically prohibiting any use of the school day by students or teachers for purposes of prayer or spiritual exercises. Would not such a legislative act directly retard the practice of religion? How would it differ from a state decision to disregard the factor of religion in distributing its unemployment fund?

Abstract questions such as these may be mischievous precisely because they neglect to consider the enormous factual differences of the programs before the Court. Semantically it may be permissible to compare the public classroom with the claims office, but the particular consequences of the intrusion of a religious element into each are quite diverse. A public program of education for the young is obviously something entirely different in its social, political and cultural importance than is a law, passed during the depression, with the objective of providing economic aid to workers so that industrial stability will be promoted. Adults use the claims office, while immature children peculiarly susceptible to suggestion and example are the denizens of the schools.

These are unquestionably important matters for detailed and serious pondering, out of which a practical judgment might be reached that the religion factor should be excluded from one, included in another. Yet if the preliminary query is, simply, what is the relevance of religion as an element for consideration by the state in the performance of certain functions properly within its power, no a priori reasons appears why recognition of spiritual concerns has a greater claim in the field of industrial compensation than it has in education. Quite the contrary might seem to be the case. Historically, at least, religious exercises as well as other means of character training have been accepted as important parts of the educational experience.


80. Should the relevance of the individual's maturity on the question of the effect of state involvements open the question of whether persons receiving unemployment compensation benefits, as a class, are more susceptible to subtle religious influences created by such a program than are other groups in the society?

81. As Justice Rutledge noted in Everson, "Indeed, the view is sincerely avowed by many of various faiths, that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated
Furthermore, the pressures which compel attendance at a public school and so pre-empt time which might be used for religious instruction are legal in nature, while an unemployment program is not compulsory and takes effect upon voluntary application by individuals driven by economic necessity. Good reasons may exist for distinguishing prayer in public school from accommodations of welfare beneficiaries based on religious grounds, but the inherent impropriety of spiritual formation as part of education does not appear to be one of them.

It may be maintained, however, that the true ground for distinguishing the two cases is the manner by and purpose for which the religious element is intruded into the public realm. When the Bible-reading was mandated by statute, the state was the prime mover and the direct target of its action was an exercise indisputably religious in character. In contrast, the benefits of unemployment compensation provided by the state do not on their face reflect any interest at all in religion. Only by way of response to the predicament created by the state preoccupation with and effect on economic matters does the provision arise for special treatment based on religious considerations. While the government in the Sherbert situation comes reluctantly to treatment of religious difference only because its action has changed economic patterns and inadvertently disadvantaged the religious claimant, the state in Schempp consciously intends to regulate religious matters by the very statute which is the focus of litigation. The distinction urged is a provocative one, paralleling the theory sometimes advanced that the First Amendment significance of state action varies in accordance with whether the legislative purpose is religious or secular.

On closer analysis, however, it becomes evident that the apparent clarity of the distinguishing not of purpose in regard to state action begins to blur. When a state legislature initiates a program of Bible-reading it is not undertaking to bring children together for the purpose of the prayer. Rather the program is incorporated into a pre-existing secular assembly hopefully staged to produce educated citizens. Children are already brought together for the civil objective of education; what is added is the religious element, on a voluntary basis and with regard for diversity of creeds. The point here is made clearly by assuming that the legislation regarding Bible reading is made a proviso to the statutory section setting up a system of public schools, which in turn is part of a compulsory school law. This govern-

from the religious phase and emphasis.” 330 U.S. 1, 46 (1947) (dissenting opinion). The role of religion in the development of the nation’s educational institutions is set forth by Justice Frankfurter in the McCollum case, 333 U.S. 203, 212 (1948) (concurring opinion).
mental activity is primarily directed to achieving literacy and educational goals for the secular society, and the provision for religious exercise might conceivably be no more than a recognition that changes introduced in societal patterns by the compulsory school regime.

In a similar vein, when an attempt is made to justify the result in the Sherbert case by reliance on the inherently secular purpose of the compensation plan itself, the argument must conveniently disregard the conscious advertence to religion which, according to that case, the constitution itself requires. However an exemption is wrought for persons unavailable for employment because of religious reasons—whether through legislative enactment or judicial construction—the state agency performing the task has as its immediate objective the subject of religion. The whole purpose of the exempting provision or decision is to regulate the religious significance of the governmental action.

It would be convenient to be able to reason from the premise that the state may never take the factor of religion under its consideration, but such a rule would seriously endanger the free exercise of religion, as Sherbert concludes. Yet if one starts with a willingness to allow state action which takes religion into account, where shall the limits be set? The modern state has an influence, direct or indirect, in every facet of contemporary life. When does the state interest in religion become impermissible?

ESTABLISHMENT AND FREE EXERCISE

As preliminary considerations, the queries and speculations of the preceding pages may not appear totally irrelevant to those who have experienced the difficulty of trying to organize and relate the various strains of judicial thought in this area. Admittedly the insouciant and free-wheeling manner of the last section ignores the traditional legal approach of harmonizing and reconciling opinions and past cases. But the purpose of this article is not to etch out patterns of judicial development,82 or even to advance a formulated key to understanding the religious clauses,83 but simply to suggest a perspective from

82. For recent reviews and syntheses of Supreme Court decisions in this area, see Moore, The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses, 42 TEX. L. REV. 142-198 (1963); KURLAND, op. cit. supra note 2; DRINAN, RELIGION, THE COURTS AND PUBLIC POLICY (1963); THE WALL BETWEEN CHURCH AND STATE (Oaks ed. 1963); Fernandez, "Free Exercise of Religion, 36 So. Calif. L. Rev. 546 (1963).

83. KURLAND, op. cit. supra note 2, at 17: "These commands would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, i.e., they must be read to mean that religion may not be used as a basis
which some of the current confusion may be understood and assessed. A new look, unencumbered by the baggage of the past, may enable us to see things previously overlooked.

An initial insight for that purpose is an understanding of the type of enterprise upon which the High Court is embarked. Without challenging in any way the Court's questionable transference of the establishment standard to the states through the Fourteenth Amendment, one must nevertheless discern that the functions which will now be performed by the First Amendment in this area are vastly different from its function as originally conceived. Whatever the philosophies of the men who drafted and achieved the adoption of the Amendment, no doubt exists that its first application was merely as a principle of federalism. 84 The most superficial investigation of the discussion in the various state conventions to ratify the Constitution, and a perusal of the legislative history of the Amendment itself, clearly indicate by the lack of extended discussion that the Amendment did not purport to set out any national consensus upon a full and detailed theory of church-state relationships. 85 Indeed it was because the states still maintained their enormous powers to determine how religion and government should stand toward each other, that the amendment to neutralize interference by the new government seemed relatively uncontroversial.

Precisely what the framers of the Amendment were able to avoid by the Amendment—a national debate and confrontation of the infinite number of views of the sacred-profane dichotomy in a pluralist nation—the Supreme Court has inspired by its conclusion that the religious clauses apply in their full content and form to the states. The Court is now engaged in articulating a national philosophy, appli-

for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.”

84. For varying views on the historic meaning of the establishment clause, see Parsons, The First Freedom (1948); Pfeffer, Church, State and Freedom (1953); O'Neill, Religion and Education Under the Constitution (1949); Snee, Religious Disestablishment and the Fourteenth Amendment, 1 Cath. Law, 301 (1955); Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause, 2 Washburn, L. J. 65 (1962).

85. The debates in the states on the proposal to adopt the Constitution contain relatively few references to the matter of religious freedom, a reflection of the understanding that the central government was not being given any power in that area. Some delegates to the ratifying conventions, however, proposed that express protection be afforded against the deprivation of liberty of conscience by the new government. Elliott, Debates on the Adoption of the Constitution (2nd ed. 1907). By way of sample of state resolutions on religion, see ratification of South Carolina, Elliott, op. cit. supra at 325, New Hampshire, at 326, Virginia at 327, New York at 328.
cable to every region and citizen, of the political terms under which church and state coexist. As long as the nature and dimensions of that enterprise are appreciated, no objections are here made to the wisdom of undertaking it.

Neither Bible-reading in the schools or state unemployment compensation schemes were within the reach of the religion clauses when it was adopted in 1791. The Bill of Rights applied only to the federal government, and the welfare state in most of its forms is a creature unknown to the 18th century mind. But history does not stand still, and hence constitutions must be flexibly interpreted and their meaning milked with a due consideration for the purposes they serve. At least to the extent that deprivation of the religious liberty of an individual constitutes violations of due process or equal protection, it is impossible to argue with the conclusion that the Fourteenth Amendment made the protections of the First applicable to the states.86 And the more tenuous grounds upon which the non-establishment standard is also fused into the Fourteenth Amendment may also be accepted on one of the several grounds suggested by the Court.87 But the same philosophy which supports the right of the Court to meet the exigencies of history by interpretations which are creative and enlivening, demands that the Justices be realistic enough to understand what role they are playing.

Whit gives point to a study and comparison of the Schempp and Sherbert cases is not any necessary intimation that these cases were incorrectly decided, but what they indicate about the vexing inadequacies of much of contemporary judicial reasoning. If the Court is going to hammer out a standard of church-state relationships which


87. Justice Clark cites a free exercise case, Cantwell v. Connecticut, 310 U.S. 296 (1940) as the original authority for the proposition that the establishment clause applies to the states through the Fourteenth Amendment. School Dist. v. Schempp, 374 U.S. 203, 215 (1963). See note 37, supra. In his concurrence in the same case, Justice Brennan meets the argument that establishment cannot apply to the states because the purpose of the First Amendment was to protect the states in their power to establish, by pointing out by 1868 such a purpose was an anachronism. All formal state establishments were abolished three decades before the Fourteenth Amendment, and this outmoded original purposes of the First Amendment could not have deterred the absorption of the clause into the due process standard. Further, he argues that the establishment clause is a "coguarantor" of religious liberty, and neither one of the clauses can protect freedom alone, Schempp, supra at 255-56. Compare Justice Frankfurter's explanation in his Sunday closing law cases opinion, McGowan v. Maryland, 366 U.S. 420, 460 (1961) (concurring opinion), that the "presuppositions of our society" infuse into due process the recognition "that a government must neither establish nor suppress religious belief."
is expressive of the structure and complexities of the society around it, the chances of its success in this endeavor will ultimately depend upon its appreciation of Hamilton's remark that it has "neither force nor will, but merely judgment." Until the Court is ready to fulfill the difficult task of producing objective and comprehensive standards by which to serve the several values of the Amendment, its decisions give promise of stimulating more divisiveness than they foreclose.

There are two objects of attention which the Amendment by its wording makes obvious intersections of thought and opinion: establishment and free exercise. The delicate position in which the Court finds itself in arbitrating the meaning of those concepts can only be appreciated if one accepts the unpalatable fact that no pre-packaged meanings are contained in the two clauses. For those who dogmatically assert that the scope of each phrase is indubitably fixed, no further discussion is necessary or desirable. But if the ambiguities of history are recognized, the analytical problems in interpreting and accommodating the two ideas are numerous. In the first place, whenever the Court interposes its authority between the state and an individual and finds a violation of free exercise rights, it is resorting to religion as the primary object of its concern. Yet it asserts that matters of religious belief are outside the competence of government. On the other hand, when the Court concludes that a particular involvement between state and religion is an establishment, it thereby restricts the freedom of those who for religious reasons want the particular state program being challenged. Yet it asserts that the state (which it represents in its decisions) cannot impose burdens on the free exercise of religion.

What is the relationship between the two parts of the First Amendment? More specifically, what are their respective constitutional roles in achieving the state neutrality on religion which the Court in Schempp says in their unitary objective? One might say that free exercise protects any manifestation or practice of religion, or action on its behalf, which does not constitute through its capture of the political processes an "establishment." Or one might alternately say that establishment prohibits all links between religion and the state which are not specifically brought within the prohibition against the state interference with free exercise. Either of these interpreta-

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88. The Federalist No. 78.

89. The relationship between the two clauses is sometimes geared to a determination of which is dominant and which subsidiary. "There are three ways of viewing this relationship: the establishment clause may be considered subsidiary and a means to the free exercise guaranty, or it may be considered independent and of equal weight, or the two may be considered unitary, two sides of the same coin, as it were." Pfeffer, Some Current Issues in Church and State, 13 Western Res. L. Rev. 9, 32 (1961). See also The Wall Between
tions assumes that all forms of religious activity is within one or the other of the constitutional phrases, but they put a different emphasis on which is to occupy the larger part of the First Amendment grounds. But in fact the First Amendment does not protect religious freedom by a grammatically comprehensive coverage of all forms of activities having a spiritual focus. The Constitution merely prohibits two specific forms of state action. Religious freedom is achieved because the state prohibited from passing laws respecting an establishment, and from interfering with the free exercise of religion. Unless the individual uses his religious freedom is collaboration with others to force the state into an establishment, he is presumably free to do whatever he wishes. Unless the state acts in a way that interferes with a citizen's free exercise of his religion, it can proceed to regulate any area (as the religious caluses are concerned). Conceivably, then, an area of religious concern lies between establishment (what the state cannot do in regard to religion, no matter how many people in the society desire it) and free exercise (what the state cannot impose upon an individual to impede the exercise of his religion) which the Constitution leaves free to determination however the political consensus dictates.

Since the free exercise clause is the traditional vehicle by which individual claims of immunity from state interference are raised, the value of religious freedom is sometimes identified with that part of the Amendment. Justice Clark in the Schempp case describes that clause as guaranteeing "the value of religious training, teaching and observance and, more particularly, the right of every persons to freely choose his own course with reference thereto, free of any compulsion from the state." Constitutionally speaking, such a definition is too expansive for not every practice of religion will be tolerated by the state, and not every burden placed on religious preferences of the individual by state action is unconstitutional. Yet the quote is representative of a natural tendency to identify the interest of religious freedom in its fullest form with the words in the Amendment which most closely describe it.

This extra-constitutional value which is so described, however, may be shaped and affected by the interpretation of the establishment clause, for when the state is forbidden to act in certain ways regarding religion, the rights of those persons who choose to seek the implementation of state programs for their own religious purposes is restricted. The compulsion of the state enters the picture through the agency of the Court and creates obstacles to the right of every

CHURCH AND STATE 3 (Oaks ed. 1963). What of the possibility that the free exercise clause may be considered subsidiary to the establishment clause?

person to free choice of his own course with reference to religion. The parents of a particular school district, for example, are forbidden to effectuate through the school board a program of prayers in public schools attended by their children.

The words of the free exercise clause thus frequently symbolize more than their limited constitutional meaning. They are employed to designate the social ideal of maximizing the freedom of the individual to practice his religion as he will, as against the establishment clause which prohibits certain institutional arrangements between state and church (or groups of religious persons) which are put outside the realization of any group or individual.

The possibility of tension between the two parts of the religion clause as thus viewed has not always been obvious to the Court. In what Justice Rutledge called the first case calling for a square determination of the meaning of the establishment clause,91 the Court was impressed by the complementarity of the parts of the Amendment and quoted with approval an earlier judicial pronouncement from South Carolina on the matter:

The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.92

At issue in the Everson case was the claim that New Jersey established religion when, by statute and township resolution, it authorized the reimbursement of parents for moneys expended in transporting their children to Catholic schools in public conveyances. Presumably the Court could have articulated the reasons why such transportation was a public welfare service—the basic rationale—without attempting to embroider the opinion with definitive interpretation of the First Amendment. Instead, Justice Black set forth the famous paragraph which was so obviously dicta.93 That dicta, of course, has

92. Id. at 15. The original citation of the statement came in Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871), quoting from Harmon v. Dreher, Speer's Equity Reports (S.C. 1843), 87, 120.
93. "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 or 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
become a constitutional formula around which much of the ensuing controversies have swirled.

The gratuitous elaboration of such a broad gloss on the establishment clause might be justified on the ground that an initial statement of overriding principle was necessary in an area preceptibly ripe for litigation. Sub silento the Court was weaving the standard of the establishment clause into the Fourteenth Amendment and thereby exposing the church-state arrangements in every state to its coverage. Exposition of the available guides would, no doubt, be helpful. Yet such an explanation of the Court's readiness to speak expansively on the issue implies that the legal problems which were anticipated were deemed relatively simple and definable. It is possible that the Court underestimated the extreme complexity and sensitivity of the church-state issue, but the presence of four dissenters in the Everson case itself casts doubt on the proposition. A more persuasive explanation is that the Court accepted as an operating premise the rule of thumb that the broader the interpretation given to each of the religion clauses, the greater the degree of religious freedom. Indeed, Justice Black, noting the latitude given the free exercise clause in earlier cases, explicitly states "there is every reason to give the same application and broad interpretation to the 'establishment of religion clause.'"94

The approach which crystallizes out of the reasoning of the Everson majority would apparently inflate each of the Amendment's parts, seriatim, to the greatest size of which it is capable. In emphasizing the complimentarity of the parts, the Court seems to deny that there can be any root difficulties in accommodating each of the values of the clauses. While the Amendment as so interpreted deals with two different fears—one of governmental corruption of religion, the other of exploitation of the state by religious groups—the goal of each part is the same: the complete separation of government and religion.95 Hence the Court easily resorts to Jefferson's metaphor as a popular expression of the constitutional standard. And with equal facility comes the boldness in the extensive enumeration of 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." Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

94. Everson, supra note 93 at 15.

95. For a critical examination of the view that the clauses are meant to protect, respectively, freedom from religion and freedom for religion, see Gorman, Toward a More Perfect Union, in The Wall Between Church and State 42-50 (Oaks ed. 1963).
tion of the things which government, whether federal or state, cannot do consistently with the First Amendment.

As against the premise of complementarity, however, the Court in grappling with the facts of the New Jersey program before it quickly discovers that the expansion of one part of the religion clause may be the contraction of the other. Justice Black is plainly concerned that an establishment ruling which would deny a state legislature the opportunity to provide for safe transportation of children to sectarian schools would also represent an impediment to individual religious freedom. He protests that welfare legislation need not excluded any citizen because of his "faith or lack of it." Even the possibility that state-financed bus transportation may swing the balance of parental indecision on whether to utilize the sectarian school does not deter the majority from its holding of constitutionality. An analogy is drawn between the school bus program and other basic welfare services such as police and fire protection, which unquestionably contribute to the readiness of individuals to exercise rights of affiliation and participation in church activities.

Thus the _Everson_ majority, prescinding from the broad outlines drawn by the quote from the South Carolina court, finds itself perforce entoiled in apprehensions about the consequences for religious liberty of a rule that a state is constitutionally forbidden to extend social welfare benefits to citizens who have exercised that freedom. At one point, the Court states that New Jersey "cannot exclude" members of any religion or of no religion because of "their faith, or lack of it." The majority thus teeters on the edge of a conclusion that the free exercise clause requires the state to make these benefits available to all. But the Court immediately disclaims these implications by asserting that there is no constitutional obligation on the part of a state to include students of sectarian schools in bus transportation programs.

In retrospect the _Everson_ opinion may be seen as a microcosm of the nagging dilemma which has plagued the Court in its development of an adequate First Amendment philosophy. The inner conflicts of interpretation displayed in _Everson_ are not too far removed from the paradox posed by the simultaneous decisions in _Murray_ and _Sherbert_. In its simplest expression, this dilemma consists in the attempt to render the state completely isolated from religion at the same time that the protection of religious liberty is maintained as a fundamental postulate of the society. Put another way, the state is at the same time struck blind to the factor of religious difference and commanded to watch diligently to avoid infringement of religious freedom.

96. 330 U.S. 1, 16 (1947).
97. Ibid.
Justice Douglas, who appears marvelously vulnerable to the full thrust of both of these ideas, has put the conflicting admonitions in one formulation:

The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish. . . .98

How it is possible for government to maintain an interest in religious freedom (much less allow it to flourish) without retaining some interest in theology or ritual (at least as a sociological fact), is not immediately evident.

The pinch for the Supreme Court has come from the two pressures, precisely at the point where the Court is most anxious to guard civil rights and to satisfy the principle that "where First Amendment freedoms are or may be affected, government must employ those means which will least inhibit the exercise of Constitutional liberties. . . ."99

When the Court interprets the religious clauses, it speaks authoritatively as government and is bound by its principle to seek the means of interpretation which least inhibits the several different liberties encompassed by the Amendment. One writer has described these several elements as follows:

... a proper Church-State relationship must be found to have two aspects. One is the restrictive aspect of organic disconnection. The other is the permissive aspect of impartial association with religious groups to achieve those ends which the secular state and religion hold in common.100

But how can both portions of the Amendment be shaped so that the liberties represented by the other are not oppressed. What is one man's organic connection between church and state may be another's permissive and impartial association.

In the past two decades the Court has sought to enunciate the relationship between these two elements primarily by an explanation of what establishment means. Several distinct patterns of judicial thinking have emerged in this effort to state the essence and scope of the first 10 words of the Amendment. In form, if not in substance, the doctrine of religious freedom has been at the mercy of the preoccupation with the need to state an acceptable rationale by which

state involvements with religion may be measured. An effort will now be made to trace the significance of these major patterns of thought.

THE WALL OF SEPARATION

The first great effort to subsume the two values of the clause under one orienting principle was made by Justice Wiley Rutledge, dissenting in Everson. In language that surely must rank as among the most eloquent and moving in American jurisprudence, Rutledge took the Jeffersonian metaphor of the wall of separation and apotheosized it. For him the object of the 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.”¹⁰¹ In the practical order, the solution offered was the subordination of the free exercise clause and the individual liberty which it connotes to the establishment clause.

Rutledge built his First Amendment doctrine on several adamant convictions which have maintained a hold on subsequent judicial thinking, though not in the same compelling way as for their originator. The first of these was the uncritical identification of the legislative history of the First Amendment with the ideological views of James Madison. The religion clauses became “the refined product and the terse summation” of the history of Madison and Virginia.¹⁰² This attitude implied not merely a recognition of the influence and leadership of Madison, who chaired the committee reporting the First Amendment. A further demand was the complete subservience of all surrounding circumstances to an investigation of the thought, opinions, and actions of the famous libertarian. The fact that five years elapsed from the passage of the Virginia Bill for Establishing Religious Freedom to the ratification of the First Amendment did not disturb the Rutledge vision of the religion clauses as a careful repetition by Madison for the nation of what he had done for his state. The existence of religious establishments in other states, whose delegates were also present in the Congress and backers of the Amendment, did not give any pause to the conclusion that Madison personified its meaning. The full vigor of the dissenting argument in Everson is brought to bear on the proposition that history is ineluctably clear on the matter, and its clarity is a function of the Madisonian mind.¹⁰³

¹⁰². Id. at 33.
¹⁰³. The guarantees of the Amendment are those which “he (Madison) put in.” Id. at 31. “Madison could not have confused ‘church’ and ‘religion’ . . . .” Ibid. The Remonstrance is appended by Justice Rutledge so that readers will
A necessary corollary to this equation of the constitutional standard with the thought of one man was the telescoping of American history and political change. The First Amendment not only translated originally as what Madison wanted, but its meaning for New Jersey in the 20th century could conveniently be found by rummaging around in Madison's papers. The traumatic changes wrought in the structure of the American polity by the Civil War and Fourteenth Amendment, for example, left the purpose and function of the religious clauses untouched and exactly comprehensible. Rutledge displayed no hesitancy in answering the questions shaped by contemporary social and economic pressures out of the mouth of an 18th century man who was concerned with the issues of a quite different world. The simplistic and anachronistic hope was indulged, not only that history would provide the final answer for this year's controversy, but that the past would favor men with the uncommon foresight of employing their language, sentiments, and prejudices so the message would come through clearly.

The answer which history so unequivocally provided for Rutledge in the Everson case was that "any appropriation, large or small, from public funds to aid or support any and all religious exercises" is forbidden. The words are similar to those framing the principles announced by the Everson majority, but the meaning is somewhat different. For what Rutledge meant by "religious exercises" was, apparently, any and all human concerns that arise in, or channel to, religious beliefs or practices. Hence, the majority's argument that bus transportation is a public service was met by the assertion that the only vital element in the case is "the religious factor and its essential connection with the transportation." It is not the amount of money expended, or why, but the principle of separate spheres for church and state, which is determinative.

The separationist construct of Rutledge is calculatedly rigid and unyielding. Compared with the vacillation and hesitancy of some other Justices on the Court regarding the historical meaning and concrete application of the religious clauses, the Rutledge dissent stands uncluttered and confident. (This may explain, in part, why from time to time a judge refers to it with longing envy while refus-
ing to follow its logic.) Where others might give the appearance of a startled recognition that the magnification of the establishment ban for one group has consequences for the religious freedom of others, Rutledge explicitly acknowledges the problem and deliberately makes his value judgment.

Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others.\(^\text{106}\)

Rutledge's willingness to sacrifice the exercise of religion as a hostage to the establishment clause was not a sterile and negative act. For him, the denial of a welfare aid because of the religious factor was necessary to assure a more comprehensive religious freedom. The ultimate value which he sought to protect is expressed in the faith that "complete separation between the state and religion is best for the state and best for religion."\(^\text{107}\) The First Amendment was something like a peace treaty in which each power, civil and sacred, covenanted to leave the other one alone. This meant that the two clauses "were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."\(^\text{108}\)

Except for one area, the *Everson* dissenter would reconcile all discordancies between the two parts of the First Amendment—between the bar on institutional links and the guarantee of individual freedom—in favor of complete separation. He candidly admitted such a view would impose hardships on the individual who follows his religious imperatives when he stated "Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom."\(^\text{109}\) His only concession to the circumstance that churches and other religious groups must seek their goals within the legal structure of the society relates to fire and police protection, and access to public highways. The explanation offered for these deviations from the logic of his approach is the comment that these protections do not require funds to be earmarked for religious instructions or uses.\(^\text{110}\) But a distinction along these lines seems subject to the same objection that Rutledge made to the attempt to sift out the state money spent on trans-

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106. *Id.* at 59.
107. *Id.* at 59.
108. *Id.* at 40.
109. *Id.* at 53.
110. *Id.* at 61, n.56.
portation in the *Everson* case and segregate it from the cost of operating the sectarian schools. Some part of the public money spent on fire fighting equipment and personnel is allocable to protection of church properties, and certainly the maintenance of the property is an essential part of the religious purpose of the congregation. The admixture of the secular and religious beneficiaries of the tax monies used for police protection would seem indistinguishable from the *Everson* situation.\(^{11}\) That this concession represents the full extent of the allowance for free exercise accommodation is suggested by the doubts expressed about the constitutionality of tax exemption of religious property.

The character of the Rutledge dissent is perhaps best described by its inability to see that the wall which Jefferson mentioned was metaphorical. Of all the writing in the church-state field, this opinion by its naivety may have performed the worst service. The power with which it was uttered forced other members of the Court to make an obeisance to its existence in future decisions. One suspects that the task of seeing the First Amendment in its entirety received an indefinite postponement as one consequence. The very next year, in deciding the case of *Illinois ex rel. McCollum v. Board of Education*,\(^{12}\) the majority wrote a wooden and unenlightening opinion in condemnation of a released time program of religious instruction classes held on public school premises. Relying exclusively on the comprehensive statement of establishment principles, dropped as dicta in the *Everson* case, the Court employed a syllogistic approach in which the minor premise described the use of a tax-supported school system and buildings, and the compulsory schools laws, as aid to religion. The fleshing out of this skeleton of reason was left to the commentators, and to the concurring opinions. The sensitivity displayed in the *Everson* case concerning the effect of a finding of establishment on claims of free exercise of religion was completely missing, though the Court explained that the holding did not manifest hostility to religion.\(^{13}\) Even the free exercise claims of the non-participating children of the Champaign school system were left unexamined. With Justice Rutledge concurring, the majority summed up their reasoning with the wall of separation metaphor, and the flaccid generality:

For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty

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111. That this concession represented the full extent of the allowance for religious freedom is suggested by the doubts he implicitly conveyed on the constitutionality of tax exemption of religious property. *Id.* at 61, N. 56.


113. *Id.* at 211, 112.
aims if each is left free from the other within its respective sphere.\textsuperscript{114}

Time and the entanglements of precedent, to which Rutledge referred,\textsuperscript{115} have shown the inadequacies of the strict separationist formula. The variety of church-state problems which have appeared in the years since Everson have proved too complex for the one-edged instrument which Rutledge forged. His simple faith in the certainties of history has given way to a growing skepticism in these matters. Justice Douglas has himself admitted that to authorize prayer in a public school is not "to establish a religion in the strictly historic meaning of those words."\textsuperscript{116} Justice Brennan among others has confessed the murky ambiguities of history, referring to the dispute among scholars over whether Jefferson and Madison would have condemned devotional exercises in the public schools if they had known the complex of factors which characterize their role in modern life.\textsuperscript{117}

The utility and advantages of the "wall of separation" as a tool of analysis has likewise been subjected to an eroding scrutiny. The elusiveness of the line between the secular and sectarian in American life has been noted.\textsuperscript{118} In a rather startling statement only four years after the \textit{Everson} decision, the Court said through Justice Douglas: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."\textsuperscript{119} The metaphor has been called by a commentator "at best a title for an idea. It suggests a disposition, or several dispositions which vary in

\textsuperscript{114} Id. at 212. Even the dissenter, Justice Reed, ignored what seems in retrospect to be a tenable framework for his argument; the interests of religious freedom represented by those using the Champaign program. Instead the dissenter relied on the numerous instances of church-state accommodation in United States history as expressive of a tradition under which this kind of involvement was permitted.

\textsuperscript{115} Everson v. Board of Educ., 330 U.S. 1, 63 (1947) (dissenting opinion): "The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents."

\textsuperscript{116} Engel v. Vitale, 370 U.S. 421, 442 (1962) (concurring opinion).

\textsuperscript{117} School Dist. v. Schempp, 374 U.S. 203, 234-35 (1963) (concurring opinion). "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. . . ."

\textsuperscript{118} Id. at 237.

\textsuperscript{119} Id. at 231 (concurring opinion).

\textsuperscript{119} Zorach v. Clauson, 343 U.S. 306, 312 (1952).
their emphasis on what should fall within the pale of separation and what should not." The coup de grace may have been delivered by an intellectual iconoclast for whom the future of this wall seems bleak.

It is doubtful whether any of the present members of the Court would fully accept the Rutledge approach and its concomitant burden on the individual's religious freedom. Yet traces of the philosophy appear unmistakably in some of the opinions. Moreover, in a broad sense, the continued efforts of the Court to break through the confusion of doctrine surrounding the religious clauses has borne the marks of the separationist view by their emphasis on the meaning of establishment as the device for illumination. If few have been willing to accept the full implications of the Rutledge conclusion that free exercise must be subordinated to the disestablishment theme, the reconciliation of the dual prohibitions on government has been most often sought through an exposition of that latter idea.

The relevance of Madison to the interpretation of the Amendment cannot be disputed, of course, but one mark of the separationist influence continues to manifest itself in an extravagant personalization of the Amendment. Justice Warren exemplified this tendency recently by relying on the fact that Madison presented a "bill for punishing . . . sabbath breakers" into the Virginia legislature as evidence that contemporary Sunday closing laws did not represent an establishment. Undoubtedly the employment of this type of historical data can be defended as an aid to interpretation, but the whole tone of the Court's reliance on Madison strikes some ears as a form of hero-worship. The exaggeration may be permitted, to make the point, that the Court often gives the impression that the measure of meaning in the First Amendment is what James Madison would have done if he had thought of a particular problem.

Since it is doubtful that the citation of biographical history often truly controls or determines a constitutional decision in this area, the form of opinions may be overlooked. But echoes of strict separationist

121. Hutchins, The Future of the Wall, in THE WALL BETWEEN CHURCH AND STATE 19 (Oaks ed. 1963): "The wall has done what walls usually do: it has obscured the view. It has lent a simplistic air to the discussion of a very complicated matter. Hence it has caused confusion whenever it has been invoked. Far from helping to decide cases, it has made opinions and decisions unintelligible. The wall is offered as a reason. It is not a reason; it is a figure of speech."
philosophy occasionally seem to constitute the whole tune of a decision. An instance in point is Justice Douglas' dissent, in the Sunday closing law cases, on the issue of establishment. One reading of that opinion would indicate that his objection is not solely that the alleged secular purposes of such Blue Laws are fictitious, but that these secular purposes (admittedly legitimate) are somehow contaminated by their association with motives of religious convenience for the majority of the population. In one sense his characterization of the challenged legislation is more incisive than that of the majority, because he clearly recognizes that the choice of Sunday for the common day of rest is dictated by religious considerations. His conclusion seems to be that Sunday is therefore disqualified as the choice of the state to achieve an admitted secular purpose. Accepted at its full value, the opinion would take outside the realm of legislative competence any area of human conduct which has significant religious associations. Just as bus transportation was religion for Rutledge because the terminal point of the trip was a religious school, so tranquility and quiet are religion for Douglas because the occasion will be employed by a substantial number for prayer. Perhaps the attribution of such a meaning to the Justice's words is extreme, but these implications of the opinion are not negatived by such comments as:

On argument, there was much made over the desirability of fixing a single day for rest, either on grounds of administrative convenience or on grounds of the need for leisure. In light of the history and meaning of the shared leisure of Sunday, this aim still has religious overtones.

This is separation with a vengeance, if the presence of religious overtones makes a potential object of legislation subject to the curse of establishment. One wonders how Justice Douglas would deal with the social chaos that could arise should the state locate one day of the week sacred to no religious group and demand that the day of commercial rest be taken then. Such a choice would arguably interfere with the free exercise rights of every religious group in the community. Just as the Sabbatarians in the Sunday closing cases suffered measurable economic burdens, so under the hypothetical an economic penalty would be imposed on all religious persons whose faith de-

123. Id. at 561 (dissenting opinion).

124. "There is an 'establishment' of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the 'free exercise' of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community." Id. at 576-77. Such a statement could take outside of legislative competence, inter alia, murder, polygamy, and suttee.

125. Id. at 576, n.7 (dissenting opinion).
manded that some other day be observed for worship. The factor of religion would then be the basis for the deliberate legislative action disfavoring believers; to avoid establishment in the sense of complete separation, the societal structure would be turned on its head. If the position were taken that the legislative choice of the hypothetical non-religious day was justified by secular purpose, the resulting burdens (of a constitutional magnitude or not) would fall only on religiously-oriented persons. Would such a holding imply that discrimination in the First Amendment sense covers only formal religious bodies, that is, that irreligion may be preferred to religion? On the other hand, if the conclusion were reached (as the dissenters in the Sunday closing cases argue) that such a burden is unconstitutional because of its interference with religious freedom, the complete separationist would be left with the unrealistic conclusion that government is incapable of acting even for genuine secular purposes if religion is in any way involved.

The flavor of the Rutledge balancing of the two portions of the First Amendment appears in still other contexts. The concurring opinion in the *Engel* case, where the New York Regents Prayer in public schools was condemned as an establishment, again reveals Justice Douglas brewing a succession of tempests in a widely diversified set of teapots. With one footnote, the whole range of links between religion and the state is canvassed and apparently condemned as representing the financing of religion.126 Justice Stewart in dissent referred somewhat unbelievingly to this reduction of the legal issue of *Engel* to one strictly of government finance, and pointed out that military and prison chaplains are paid by government.127 His clear implication is that such arrangements are not unconstitutional. Whether they are or not under a strict separationist approach would seem entirely debatable, particularly with Justice Douglas' reference again to the Rutledge standard of a "double price for religious freedom," cited in its entirety.128

Where the wall philosophy has not reappeared in the form of decisional judgments or analytical constructs, it occasionally provides the background and inspiration for extravagant excursions into the legislative purpose of the First Amendment. The majority opinion in the *Engel* case cites not one precedent in support of its conclusion

126. *Engel v. Vitale*, 370 U.S. 421, 437, n.1 (concurring opinion. "Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes."

127. Id. at 449, n. 4 (dissenting opinion).

128. Id. at 443-44.
that a 22-word non-denominational prayer led by the public school teacher before morning classes is an establishment.\textsuperscript{129} Rather than rely on precedent, a far-ranging analysis of English history is harnessed to citations from Madison's Remonstrance to raise specters of religious persecutions and the perversion of sacred things. Without challenging most of the ideological content which the Court finds in the establishment clause, a reader may still admit that the opinion hardly sheds a crack of light on the contemporary function of the Amendment. To say that the clause forbade a union of government and religion, that it reflected a conception of religion as too personal and sacred to risk perversion by the civil magistrate, that it expressed the concern that religious persecutions follows establishment—these still leave hanging the determination of what destroys government and what degrades religion. The imaginative student may here provide his own particularized reasons as to why the prayer must be excluded from the school. The Court's function is discharged when it rings some familiar sounds upon the bell of complete separation. Except for those with Justice Rutledge's passion to rive the two cities apart no matter what the cost, there is a certain incongruity in Justice Black's association of the anemic prayer described in the case with the "anguish, hardship, and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power."\textsuperscript{130} This is not to say that the prayer is permissible or constitutional. The conclusion rather is that such a question is buried under the rhetoric of the Court. And not the least difficulty with fixations on camel’s noses and first experiments with liberty is the intellectual chaos which they inflict on serious efforts to formulate a viable public policy which recognizes that there has to be a successful co-existence of the two forces.

**THE COERCIVE ELEMENT IN ESTABLISHMENT**

An established church in the historical sense was one which had the preferment of the government.\textsuperscript{131} The restriction of the words of

\textsuperscript{129} A reference to Everson in note 11, 370 U.S. 421, 428, is solely for the purpose of indicating that the history surrounding the fight for religious freedom in Virginia is set out there. In Schempp, Justice Clark explained that the principles which were determinative in Engel were so "universally recognized" that no precedent needed to be cited. 374 U.S. 203, 220-21 (1963). For another explanation, see Kauper, *Prayer in the Public Schools*, 61 Mich. L. Rev. 1031, 1048-49 (1963).

\textsuperscript{130} 370 U.S. 421, 429 (1962).

\textsuperscript{131} As Joseph Story expressed it in his *Commentaries*, Vol. II, §§1874, 1877: "An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference would have created a universal disapprobation,
the First Amendment to such a concept would not in itself free the application of the religious clauses from difficulty. For while some marks of establishment in this sense are readily detected, a point would soon be reached where the line-drawing of legal definition would experience difficulty. The focal question to be answered would be whether or not the challenged state action favored a particular religious denomination. Moreover, the demarcation between what established and what infringed the free exercise of religion would not separate mutually exclusive effects. For often what would help to preserve the establishment, such as punishment of nonconformists, would at the same time infringe individual liberty. Nonetheless, a certain symmetry of coverage would emerge from such a conception of the religious clauses: all sects would be protected from disadvantage under the first part of the clause, and all individuals would be protected from state coercion regarding religion under the second.

Whatever the merits of the arguments for such a reading, the Everson and McCollum cases expressed a view that establishment means something more than mere preference. If for no other reason, the word "respecting" has seemed to the court to intimate a broader prohibition of associations between religion and the state than the historical meaning conveyed. One consequence of this decision, however, is to make the expression of a standard for determining establishment excruciatingly difficult. How much more than preferment does non-establishment cover in the relationships between church and state? The separationist view, mentioned in the previous section, seems to start with the rule that all ties between the two are severed and then make incidental qualifications to this according to an unarticulated and perhaps indefinable measure. Justice Rutledge stopped short of denying police and fire protection to churches, but on grounds that are difficult to rationalize. Ample room exists under this method to rely on the "prepossessions" which Justice Jackson frankly confessed to operate.

if not universal indignation . . . The real object of the Amendment was to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government."

132. See note 84, supra.


134. "It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own
Implicit in the separationist principle is the need to draw the line somewhere, however, for common sense dictates that the state cannot allow churchmen to operate outside the boundaries of its control and, contrariwise, the churches cannot be expected to provide their own sewage systems. Churches are recognizable social organisms of religion which must share in the common conditions of society, and so in one sense they are "aided" by the state in a multitude of common ways; they and their agents use the currency, the streets, and the sanitary facilities. By the nature of church activities, moreover, individuals are influenced and shaped in ways that have consequences for the operation and extension of the state. Each of these forms of human association trench upon areas that potentially are inhabitable by the other, and "no constitutional command which leaves religion free can avoid this quality of interplay."135 If the interplay were not observable, one would begin to suspect that religion were not free.

Just such suspicions and fears of hostility to religion by the state in the wake of the absolutism of the separation principle are apparent in the Zorach v. Clauson case, which rejected the claim that a released time program of religious instruction off the premises of the public school is an establishment. While the only explicit reference to the free exercise clause by Justice Douglas, writing for the majority, took the form of rejecting a contention that the non-participating plaintiff was being pressured into taking the religious instructions, the majority obviously had in mind the disadvantage imposed on private religious activity if the school could not accommodate its schedule to such a program. The Court expresses concern that the state and religion may be "aliens to each other—hostile, suspicious, and even unfriendly."136 The Zorach program is compared to the situation of a Protestant, Jew or Catholic child seeking permission to be absent from school to attend a religious service. Even though the state teacher may require confirmance of the fact of attendance at the service, the Court cannot conclude that this is impermissible. Rather the state through its agent is here merely making it possible for the student to participate if he wishes, and this permissiveness is desirable. To the Court's mind, a contrary attitude would represent a preference of those who believe in no religion to those who are believers. Public institutions are allowed under the ruling to adjust their schedules "to accommodate the religious needs of the people."137

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137. Id. at 315.
It will be observed that the Court in Zorach is enmeshed in the same kind of apprehension that characterized its treatment of the Everson facts. In neither instance can the plaintiff make a free exercise complaint, because no infringement of his religious freedom had occurred. Nevertheless the substantive issue to be decided by way of the establishment clause was seen to have significance for the religious freedom of those children and parents who wanted to participate in the instructional program. Viewed in this perspective, the program would not be considered constitutionally necessary; rather the point would be that if the Court held the state powerless to institute such a program, that conclusion of establishment would itself be an impediment to the free exercise of religion.

Zorach can hardly be said to comply with the strict separation view and moreover, posed a serious problem of harmonization with the McCollum decision. For the dissenters who were unwilling to levy the charge for religious freedom which Rutledge quite frankly did, it became necessary to explain why—other than the fact that a religious element was found in the problem—the released time programs were offensive to the establishment clause.

The majority opinion in McCollum had been less than illuminating on the precise grounds for the constitutional disqualification of the Champaign program. The Court there had noted the use of tax-supported property and the cooperation between school authorities and religious leaders; it had also referred to the fact that a compulsory education system helped to provide pupils for the religion classes. The embracing implications of the wall metaphor would cover both McCollum and the slightly different arrangement that was present in Zorach. But the dissenters in the latter case now sought to define more precisely what features of these arrangements ren-

138. In Zorach, plaintiff tried to raise the free exercise claim and the New York court refused a trial on that issue. Justice Douglas for the majority thought the only allegation on the matter—in the complaint were worse than “conclusory” because they did not implicate the School authorities in the charge of coercion. He concluded “It takes obtuse reasoning to inject any issue of the ‘free exercise’ of religion into the present case.” 343 U.S. 306, 311 (1952). The dissenters, however, thought that an opportunity be given plaintiff to support his claim with evidence. 343 U.S. 306, 322 (1952) (Frankfurter, J.) In Schempp, Justice Brennan concludes that the free exercise claim does not serve to distinguish McCollum and Zorach but remarks that he recognizes there is a question of proof in the latter. 374 U.S. 203, 261, n. 27 (concurring).

139. The author of Zorach, Justice Douglas, reconciled that decision with McCollum by reference to the fact that public classrooms were not used and hence no public funds were expended. Expenditure of funds, even in the smallest of amounts, has been the focal point of the Justice’s approach to establishment problems, note 126 supra.
dered the programs offensive to the establishment concept. The new note that appears is an emphasis on the coercive features of the plans.

Justice Frankfurter had already anticipated and relied on this element in his concurring opinion in the *McCollum* case. While placing his ultimate holding on the broader ground of "fusion of Government and of religious sects,"\(^\text{140}\) and notions of complete separation, he had also conceded that "we are dealing not with a full-blown principle nor one having the definiteness of a surveyor's metes and bounds."\(^\text{141}\) As part of an historical summarization of the place of religion in the public schools, he had further recognized that the released time idea in some sense represented a manifestation of the free exercise of religion.\(^\text{142}\) It therefore became necessary to study the operation of the specific program before the Court and to isolate the features of it which rendered it objectionable. Two effects which the Justice deemed coercive in character are specifically noted, the "obvious pressure upon children to attend" these religious classes, and the "feeling of separatism" engendered in those children belonging to sects which do not participate in the program.\(^\text{143}\) That these consequences are not statistically verifiable does not make them irrelevant in Justice Frankfurter's mind. Together they help to give content to his judgment that the Champaign program leads to the "consequences against which the Constitution was directed."\(^\text{144}\)

All three of the dissenting opinions in *Zorach* pick up this characterization of inherent pressure and develop it in various ways.\(^\text{145}\) Justice Black, the author of *McCollum*, proceeds to expand on this rationale by emphasizing that released time programs employ the state's educational machinery to channel students to religious in-


\(^{141} \) Id. at 217.

\(^{142} \) Id. at 225. "Insofar as these (released time classes) are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom."

\(^{143} \) Id. at 227-28.

\(^{144} \) Id. at 228.

\(^{145} \) The *McCollum* decision is frequently characterized in subsequent opinions as being based on coercion, though the majority opinion in that case made no special point of that element. When Justice Warren refers to the *McCollum* case in *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), he would seem to be describing the concurring opinion rather than the majority: "The Court found that this system had the effect of coercing the children to attend religious classes . . . ."
struction. The shadowy outlines of separation of church and state are now drawn sharply into a picture of state coercion:

Here the sole question, is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids.146

Justice Frankfurter concentrates his attention on the putative coercion exercised against those students who chose not to participate in the program and hence are kept in school classrooms during that time. What the plaintiffs had raised as an issue of “free exercise” Frankfurter now transmutes into an element of the establishment basis upon which he rests his conclusion of unconstitutionality.147 Justice Jackson includes both the participating students and those remaining in the school room as objects of the coercion and characterizes the underlying reason for the invalidity of the *McCollum* program as state compulsion too.

While these analyses of possible coercive features in an establishment claim may help to demonstrate on otherwise unbridled principle of separation of church and state, they simultaneously create difficulties in maintaining a tenable balance between the two clauses of the Amendment. For what is to distinguish an establishment from an infringement of free exercise of religion, if both are judged by the coercion exercised on an individual? As noted above, the very existence of an establishment in the historic sense almost invariably imposed burdens of one sort or another upon members of the society, so that what established usually infringed free exercise of religion.148 Yet there was a distinguishing mark between the two prohibitions which, while it would not prevent overlaps, would help to keep the concepts analytically distinct. An establishment was marked by favoritism to a sect, irrespective of whether this was accompanied by coercion on the individual. State action which did not represent such

147. Note 138, supra.
148. If this were not so, there would hardly be any need for an establishment, which only becomes meaningful if some given number of citizens refuse to follow (or potentially are dissenters from) an accepted orthodoxy.
preference for a particular church could nevertheless directly or indirectly infringe free exercise.

Once preference is eliminated as the standard, however, there does not appear to be any convincing way by which the two clauses of the Amendment can be distinguished on the basis of coercion alone. Obviously the Justices in *Zorach* were not maintaining that you could never have an establishment except when you could show the type of personal burden on religion which would also support a free exercise claim. The plaintiff had raised the free exercise issue, and it would have been a simple matter to premise the disagreement with the majority upon that element. What seems more likely is that the dissenters were suggesting that there are certain types of involvements where the effort to maintain a difference between the two clauses is unimportant, and narrow conceptions of state compulsion must give way to a comprehensive philosophy of church-state not bound in any confining way to the exact words of the Amendment. This would imply, however, that the notion of coercion to describe these proscribed involvements is being used in a special and not very helpful sense.

That the temptation is sometimes irresistible to merge the two clauses in one undifferentiated lump for purposes of decision is confirmed by the case of *Torcaso v. Watkins*. A provision of the Maryland constitution required that holders of state offices make a declaration of belief in God. Justice Black for a unanimous Court struck down the requirement under the First Amendment without finding it necessary to clarify which of the portions of the religious clause was controlling. On one hand the Everson paragraph with its ban on a state forcing a person to profess a belief in any religion was cited as controlling over what is presumably an establishment issue. On the other hand, the last few paragraphs of the decision center on the impact of the requirement on the individual notary public who was plaintiff, concluding that there is an invasion of his "freedom of belief and religion." The result is surely as uncontroversial as can be imagined in the church-state field. The failure to state a specific part of the Amendment as ground of decision may be dismissed as unimportant, since the state had obviously acted in a way which had a direct effect upon the individual's religious freedom by conditioning access to a state office on acceptance of a deity.

But there are several difficulties in an approach which indiscriminately fuses the two parts of the Amendment under a common denominator of coercion. A practical problem is the question of stand-

150. Id. at 496.
ing, for if there are coercive features in whatever governmental action qualifies as establishment then the pleading itself, if it is sufficiently meritorious to state a claim for relief, must entitle the plaintiff to be heard on the issue of free exercise as well. The Court in the Sunday closing law cases was unwilling to go this far, however, despite the fact that the allegations of the appellants were that the purpose of the prohibition of work was to induce people to join Christian sects and encourage Christian religion worship. It is not perceived why the mere fact that the plaintiffs were able to resist these alleged pressures would deny them the opportunity to contend they infringed their religious liberty. Yet even Frankfurter himself agreed that such parties had no standing to assert the free exercise clause because, he said, they had not alleged infringement of their own rights of conscience. There thus appears to be instances of state involvement with religion which might constitute establishment and yet not entitle certain persons within the ambit of that involvement to be heard on a free exercise claim unless they specifically and publicly allege that their religious views are different than those being favored by the state. The burdens imposed on free exercise are at least in some instance distinguishable from the effects created by the establishment.

A more serious difficulty with the standard of coercion as a touchstone for all church-state problems is that it blurs some important distinctions in analysis and provides a chameleonic word to justify conclusions. When Justice Black spoke of the participating students in the Zorach released program as being pressured into attending the lessons, he surely oversimplified what is a complex of problems.


152. McGowan v. Maryland, 366 U.S. 420, 431 (1961): "The essence of appellants' 'establishment' argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day."


155. 343 U.S. 306, 318 (1952) (dissenting opinion): "Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery."
Some children in the group to which he referred may have been unenthusiastic about their attendance while their parents were determined that they make every lesson in the program. Children are not often enthusiastic about any form of study, and to speak of the state compelling them to a religious observance when it complies with parental decision is not a particularly helpful analysis. Other children whose parents are indifferent to the released time plan may be influenced by the participation of their classmates. The state is hardly responsible for this kind of childish imitation, but it does provide the occasion by its cooperation with the religious authorities for its operation. Another group of children may express parental decision by refusing to enter any such instructional program, choosing instead to remain in school. The social pressures which greet such a nonconformist may indeed be great. Conceivably his freedom (or that of his parent, depending on where the critical choice is lodged) has been infringed by the state's participation in the program which permits these pressures. But the appropriate vehicle for testing such claims initially would seem to be the free exercise clause. At least it is not clear that the mere possibility of such an influence, working with what unknown effect, and without regard for the particular precautions built into the program, produces any substantial or material effect on religious choice.

That the Court will not pursue to the limit such speculative estimates of the coercive aspects of state programs as the defining char-

156. Justice Brennan points out some of the available studies on the question of peer-group pressure on individuals refusing to follow the path of the majority in School Dist. v. Schempp, 374 U.S. 203, 290 n. 69 (1963) (concurring opinion). For an excellent presentation of the position that religious programs in the public schools exert indirect coercive effects, see Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 MINN. L. REV. 329, 343-50 (1963). The authors do not face the question of what religious effects are produced by deliberate state decision to exclude these programs from public schools. Compare the view of Ball, The School Prayer Case, 8 CATH. LAW. 182 (1962), and The Forbidden Prayer, THE COMMONWEAL, July 27, 1962.

157. The Court has bypassed the free exercise claim in favor of decisions based on establishment in several instances McCollum and Zorach could be considered as raising free exercise questions, supra note 138 supra. In Schempp, Justice Brennan concluded that the excusal provision of the Bible-reading program necessarily operates in a way to violate free exercise. His reasoning is that the child is being called upon to profess publicly the fact of its disbelief as the price of being excused from the exercise. An analogy is drawn to Speiser v. Randall, 357 U.S. 513, holding that the conditioning of a tax exemption upon the affirmation of loyalty to government was unconstitutional since it threatened to deter persons from constitutionally-protected activities which might raise questions of loyalty, since the taxpayer has the burden of proving his innocence. 374 U.S. 203 at 288-293 (1963). Would it be permissible to set up the program so as to require those who wanted to participate to make their wishes known?
acteristic of violations of the establishment clause is evident in the case of *McGowan v. Maryland*. The establishment claim was made there by seven employees of a discount house who were convicted and fined for selling on Sunday in Maryland. In rejecting the argument, the Court concluded that the statutes' "present purpose and effect is not to aid religion but to set aside a day of rest and recreation." The Court's opinion is replete with argument concerning the historical indicia of purpose, but one would be hard put to say on what grounds the Court could determine the effect of these laws in terms of the influences created on religious choice. One may doubt that the atmosphere and living patterns preserved and maintained by such laws have been completely divorced from individual decisions to adopt a form of Christianity, or to individual practice of Sunday church-going. Little doubt exists that Sunday was selected as the day of rest precisely for the reason that a majority of persons considered that day holy. If the presence of any minimum social compulsion on religious practices in the framework of state-sponsored regulation is the hallmark of establishment, the Court in *McGowan* should have condemned the arrangement. Justice Warren in that case did refer to the argument based on coercion in his attempt to distinguish the *McCullum* case, which through the alluvial accretions of time was now summarized as a situation where the "system had the effect of coercing the children to attend religious classes." Of more importance for the present discussion, Warren then concluded "no such coercion to attend church services is present in the situation at bar." There is no need to argue the merits of a distinction between *McCullum* and *McGowan* based on the degree of religious influence exerted by the respective state involvements, to assert that the difference is only one of degree. The validity of the statement that there is "no such coercion to attend church services" may be as debatable in the Blue Law cases, as was the dissenter's assertion that coercion existed in the released time programs of *Zorach*.

It is true, of course, that the majority in *McGowan* found that a secular purpose had intruded itself into the state involvement with Sunday closings. Thus the modern statutes were distinguished from earlier laws which had specifically set forth a goal of inducing observance of the Lord's Day. Even when church attendance was not compelled under these prior statutes, the exhortatory purpose to encourage religious observance was apparent. But the question

159. *Id.* at 452.
161. *Id.* at 433. A Massachusetts Bay instruction is quoted by the Court: "And to the end the Sabbath may be celebrated in a religious manner. . . ."
being examined here is whether any minimum of religious influence stemming from state action can be labelled that form of coercion which serves to distinguish an establishment of religion. Under such a standard even the modern statutes have a significance on influencing men's conduct in regard to religious belief and practice. As Justice Warren noted in his comparison of the case with *McCollum*, there are a number of activities which individuals may busy themselves with on Sunday other than church-going whereas children may be more limited in a study hall waiting for the school bell to ring. But this only establishes that the form and weight of the effect is different. If one is an establishment of religion, and the other not, the difference must either lie in those features extraneous to the single feature of coercion, or in the fact that the degree of coercion in one arrangement is measurably more important than in another. If the former is the case, then the legal standard of coercion to define establishment would seem inadequate. If the latter is the correct alternative, then the question must be raised why it would not be more efficient to test the matter first under an analysis of how free exercise is affected, since ordinarily coercion is provable only as it operates on an individual. Why judge the weight of compulsion in the mass, as it were, before the more manageable assessment of effect on an individual is made?

Yet it might be maintained that the radiations of certain governmental involvements are so subtle and empirically elusive that they cannot be reliably detected under the standard of free exercise, and yet should count in any final judgment whether such action is permitted under the First Amendment. It may be, in other words, that what has been designated "coercion" in the decisions we have been discussing is actually a reflection of some element in the challenged arrangements which affects to an improper degree the quality of religious freedom as understood by the justices. This is merely another way of contending that the establishment clause is broader than the free exercise clause and not restricted to only those verifiable burdens on religion which an individual can demonstrate in a court of law. To the degree that this explanation becomes merely an exhortation to trust in the judgment of the Court to know what is desirable and what not in the American environment, it may lack persuasion to some ears. To the degree that it promises a principled theory of how these more subtle influences are to be recognized, it seems to admit

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*Sunday law from New York in 1695 began "Whereas, the true and sincere worship of God according to his holy will and commandments, is often profaned and neglected by many of the inhabitants and sojourners in this province. . . ."* *Id.* at n. 10.
that the factor of coercion in its ordinary meaning is not the instrument for elaboration.

And the cases themselves have tended to indicate that the Court no longer, if it ever did, conceives of coercion as being a defining instrument by which to plumb the reaches of the establishment concept. In the Engel case, Justice Black for the majority referred again to the overlap of coverage between the two parts of the Amendment, but specifically stated "they forbid two quite different kinds of governmental encroachment upon religious freedom." The establishment clause was differentiated from the free exercise clause in that it does not demand any "direct governmental compulsion." There may be violation of the First Amendment "by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Justice Black then continued:

This is not to say, of course, that laws officially prescribing a particular form of religious worship do 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.

Read broadly, this comment would seem to indicate that an establishment always contains coercion, and offer some encouragement to the hope that in a contemplation of those "indirect coercive pressures" there lies the path of illumination. What the statement means in context, however, is that the confirmation of the presence of establishment in the constitutional sense depends on criteria other than the recognizable burdens laid on individuals in their religious activities, even though often that which establishes may also practically affect the free exercise of religion by individuals.

RELIGION AS AN OBJECT OF LEGISLATION

The determination of the circumstances under which actions of government impermissibly interfere with or impede the exercise of religious convictions of an individual is a difficult task, but a manageable one. A fairly consistent standard has been employed, and

163. Ibid.
164. Id. at 430-31.
165. Id. at 430-31.
while the balancing of the interest of the state in a particular matter against the burden on the individual may excite exceedingly delicate judgments, the opportunity to refer the decision to a definable interest of an individual helps to provide a framework for re-evaluations and critical analyses. "Predicated on coercion," as Justice Clark wrote the free exercise clause offers opportunity for a contest between two adversaries over the restraining effect of a state enactment. The establishment prohibition, however, as thus far considered, has escaped compression into a recognizable and acceptable formula whose application can be similarly examined. Efforts to expand it to bar all points of contact between church and state, the "wall" mentality, have shown themselves unhistorical and unworkable. At the same time, the intimations that establishment may differ from free exercise by the measure of some indirect coercive effects present in prohibited state involvements have not been confirmed. A third tributary of judicial thought has meanwhile been engrossed with a rationale for establishment that places emphasis on the object or purpose with which the state action touches religion. The relationship between the two forces is studied from the viewpoint of what aims and ends of legislation relative to religion should be condemned.

The *Everson* formulation itself contains a literal semblance of this method of distinguishing an establishment, though it sweeps indiscriminatively over matters of free exercise as well. Removed from the separationist philosophy with which it is usually interpreted, the paragraph enumerates certain categories of state objectives vis-a-vis religion which are forbidden. They include the setting up of a church, the passage of laws which aid or prefer religion, the subsidization of religious activities or institutions through taxes, and the participation in the affairs of a religious organization. Of these, the fulcrum for several decisions has been the prohibition against aid, preference or promotion of religion.

What constitutes aid and promotion of religion did not receive any detailed analysis in the cases immediately following *Everson* Justice Black apparently thought it obvious that the released time program of *McCollum* was state aid to religion. This inference was drawn from the "utilization of the tax-established and tax-supported public school system" and the use of the compulsory public school machinery. Such economic assistance as might be provided to partici-

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168. Also included in the formulation, note 93 supra, are prohibitions against forcing or influencing a person to go or remain away from church, and punishing a person for professing religious belief or disbelief. These would seem to be primarily free exercise issues.
169. 333 U.S. at 210 (1948).
pating denominations by the use of classrooms and utilities would hardly recommend itself as the basis for the holding, though this was one of the grounds on which Justice Douglas distinguished the case from the Zorach program.\footnote{170} It is difficult to believe that the decision of the Court in McClloum would have been different if the religious groups participating in the program had agreed to rent the rooms during the period of the instruction, or pay the light and heat bill. Whatever aid was present for religion in McCollum would seem to consist of the cooperation between the public school authorities and the religious groups in offering the instructional program. The coercive effects which might be attributed to this program have been discussed in a prior section, with the position being urged that such a factor is better tested initially under the free exercise clause.

Putting aside the question of direct or indirect coercion, which was largely a second thought explanation of why the program was objectionable, why should the program either in McCollum or Zorach be considered as an aid to religion rather than what Justice Reed called "those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society."\footnote{171} The questions raised by the dissent are still worth asking in seeking an insight to the meaning of establishment:

I find it difficult to extract from the opinions and conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors.\footnote{172}

\footnote{170. The author of the Zorach opinion points out that "All costs, including the application blanks, are paid by the religious organizations." 343 U.S. at 309. The importance of the element of cost to Justice Douglas is emphasized in the Engel case, see note 126 supra. In the McCollum case, Justice Jackson took a different position on the significance of the cost item: "But the cost is neither substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 234 (1949). However, the Court refers to the McCollum case as involving the use of tax-supported buildings, to distinguish it from Sunday closing laws, in McGowan v. Maryland, 366 U.S. 420, 452-53 (1961).}

\footnote{171. Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 249 (1949) (dissenting opinion).}

\footnote{172. Id. at 240.
Part of the answer as to why involvement in released time programs has been considered establishment is the special civic values which members of the Court attribute to the public school. Significantly, a good part of the modern litigation in the church-state field has been drawn out of that public institution. For Justice Frankfurter, this agency is a "symbol of our secular unity." In his McCollum opinion he devoted much of his attention to the evolution of the common school in this country, remarking that its development was also "the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people." Recognizing that the secularization of the schools had been achieved over serious objections and multiple disputes, Justice Frankfurter did not minimize the fact that "prohibition of the commingling of sectarian and secular instruction in the public school is of course only half the story." The instances of cooperation between church and state which swung the balance for Justice Reed in favor of the constitutionality of the Champaign program, were not controlling with Frankfurter as far as schools were concerned. Against the background of sectarian strife which had prompted the educational developments in the various states, he concluded that the released time programs represented a fusion of governmental functions with those of religious sects.

This same ineffable quality of the public schools is celebrated by Justice Brennan in his extensive statement in Schempp of his church-state theory. What makes the intrusion of the religion element constitutionally objectionable is that the "public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort — an atmosphere in which children may assimilate a heritage common to all American groups and religions." What this type of reasoning means in terms of a First Amendment philosophy is that the distinctive public nature of an institution dictates that all manifestations of the free exercise of religion be excluded. Justice Stewart issues the challenge in this regard when he questions whether the rights of free exercise or, more broadly, the interests of religious freedom, can be satisfied with an explanation that parents who desire religion in their

174. Id. at 214.
175. Id. at 220.
children's education must pay the price of the private school and give up their opportunity to employ the public facility."\(^{177}\)

For Justices Frankfurter and Brennan, the urgency of keeping the public school untouched by religious factors does seem to demand that choice. The latter puts the matter in unmistakable terms:

The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private, or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative — either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public school from private or sectarian pressures.\(^{178}\)

There are echoes of Justice Rutledge's double price for religious freedom here, but what represents a variation in the approach is the clear willingness of both Justices to admit the prudential nature of their judgments. Each insists that the conclusion is one steeped in the particular facts of a specific institution, and that all involvements between state and church may not be similarly banned.\(^{179}\)

As a political or educational judgment on the merits of such state schools may have much to recommend it. What causes concern, however, is the caliber of the credentials by which this view claims constitutional weight. While Justice Frankfurter has available the historical evidence of state trends away from religious programs in the schools in the nineteenth century, he must still translate those heterogeneous patterns into constitutional doctrine. It is not enough to quote President Grant or even Elihu Root on the matter, to conclude that the Constitution removes the choice from the power of the

\(^{177}\) A discussion of the differences between Justices Brennan and Stewart in this regard is found in Pollack, Public Prayers in Public Schools, 77 Harv. L. Rev. 62, 75-77 (1963).

\(^{178}\) School Dist. v. Schempp, 374 U.S. 203, 242 (1963) (concurring opinion). Justice Frankfurter expressed the same conclusion in these words, "The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 216 (1948) (concurring opinion).

state. A wit has remarked that public schools are indeed a National Shinto, but even a ritual of Americanism does not offer complete immunity from demands that the Court buttress its conclusions with propositions which draw their strength out of neutral principle and reason. That there is a fuzziness about the judgment that public schools represent a special subject for constitutional purposes is suggested by the poverty of Justice Brennan's formulation of "too close a proximity" as the reason for objection to these religious programs.

But certain definable standards for the conclusion of establishment in the public school situations are attempted in the opinions. The first which might be mentioned is the judicial specification of the divisive elements introduced into the community by the intrusion of religion into public schools. The watermark of establishment in this regard is the accentuation and sharpening of consciousness of religious differences, Justice Frankfurter asserts. An apprehension also arises that the appearance of religion in the school environment will inevitably produce unequal treatment of sects because of the practical difficulty of providing for a diversity of views with the limited number of programs that can operate. Either a preference for one religion will appear in the implementation of the programs, or the dominance of religious beliefs over nonbelief will be promoted de facto by the consideration that formal religious views assume organizational shape while non-belief and individualized spiritual commitments do not. Thus some views may not be represented in the programs. Christianity itself is splintered into innumerable sects, some of a size which would not justify participation. The availability in a given community of interested Jewish participants for a program, or teachers of Buddhism, Taoism, Ethical Culture or Secular Humanism is another question to be considered. Furthermore,

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180. The reference to Grant in the McCollum opinion, 333 U.S. at 218, constitutes "what must be the first tribute ever paid him as a political philosopher," according to Hutchins, op. cit. supra note 121, at 18.

181. School Board v. Schempp, 374 U.S. 203, 259 (1963): "... the Establishment Clause embodied the Farmers' conclusion that government and religion have discreet interests which are mutually best served when each avoids too close a proximity to the other."

182. The object at this stage is to consider legal standards other than those based on notions of complete separation of church and state, or indirect coercive effects, subjects which were considered earlier in this article.


184. All of these are religions for purposes of the First Amendment, Torcaso v. Watkins, 367 U.S. 488, 495, n. 11 (1961).
some of these groups may choose not to participate; for some, it may be unholy to do so.

There are several edges to this general approach of detecting establishment by reference to the anticipated divisive and preferential effects of a given state program. The first is the possibility that in practical operation the program will materially burden a non-participant in a way to coerce his religious choice. Conceivably that might be isolated as a free exercise question. On the other hand to the degree that all involvements with religion must be sensitive to pluralism, since to consider religion at all in the United States is to recognize first the diversity, an outright condemnation of all divisive signs as establishments is simply unrealistic. Sunday closing laws would be divisive in that sense.

There might be an intermediate position, for purpose of defining establishment, between those state programs which merely reflect the inevitable consciousness of religious difference on the one side, and those which specifically inhibit an individual’s religious exercise, on the other. This median could be described in terms of the probability, in a given involvement between state and religion, that strife between sects will result. The test that would be employed would depend upon an estimation of how a governmental link with religion would affect the jealousies and rivalries of varying religious and non-religious views.

The Court has apparently purported to employ some such guide in the decisions, but unfortunately the judicial effort has more often a way of making a conclusion than a serious pragmatic judgment of the consequences of these involvements for civic peace. In this constitutional area perhaps more than in others, the Court has found it hard to pass up temptations to utter colorful condemnations that often come closer to being declamations than close judgments of societal consequences. Justice Black in striking down the in-premises released time program evoked the picture of colonial disputes “where zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim and kill those they branded ‘heretics,’ ‘atheists’ or ‘agnostics.’”\(^{185}\) Again in the Engel case, the same frenetic tone was applied to the judgment of non-sectarian Regents prayer, the saying of which was voluntary, by the recollection “that governments of the past had shackled men’s tongues to make them speak and to pray only to the God that government wanted them to pray to.”\(^{186}\) The excitations of such alarms to explain

the defining marks of the modern establishment are extravagant but worse, they are self-defeating. For the same inflated fears of governmental domination of men's beliefs which are purveyed by these words may be turned in rash judgment against the Court itself, which is then accused of manifesting official hostility to all religions.

Still the evaluation of consequences of certain involvements with religion need not be made a rhetorical weapon. What the Court has more carefully attempted in several instances is the enumeration of the dangers which were feared by the writers of the Amendment and then determine whether the program being challenged in a given case threatens to produce those results. There is obviously much to recommend this approach. The trouble has been that the purposes of the Amendment can only be formulated in a distressingly broad way. When one has said that the avoidance of religious strife is an object of the establishment clause, the reduction of this principle to the specifics of a McCollum or Zorach program is not made noticeably easier. A judgment must still be made whether a particular arrangement is "real threat" or "mere shadow" in terms of its hazardous consequences. In the last analyses, is the determination that religious programs in the public schools constitute a penetration of the constitutional zone anything more than a reflection of the sensibilities and prejudices of the justices? One can think of worse methods of deciding such vexed questions than entrusting them to a bench of Justices, and but one may also be able to think of better ways. At any rate, most would agree that if the judges are to make these delicate judgments their efforts should be directed to the articulation of some rational grounds upon which to explain the choice.

Some forms of governmental interest in religion are clearly proscribed by the establishment clause since they would align governmental power behind a particular religious institution or view and create dangers for religious freedoms. The selection of a test oath in the Torcaso case is one example. The state there exacts a commitment to a belief in God as the price of serving it and performing public functions. The attitude of the Framers to such oaths is shown by Article VI of the Constitution eliminating religious tests dealing with federal offices. That such requirements do represent a

188. Id. at 308 (Justice Goldberg concurring).
189. Dean Erwin Griswold has expressed the regret that the Engel case was ever thought of "as a matter for judicial decision . . ." Absolute is the Dark, 8 UTAH L. REV. 167, 173-74 (1963). For another skeptical view about the wisdom of resolving such questions through judicial rule, see Sutherland, supra note 9, at 39-45.
state judgment on the validity of a religious belief is apparent in the justification usually urged that the oath assures the integrity of the officeholder. If an historic establishment would not have been violated by such a condition, there is little ground to argue that it does not interfere with the free exercise of religion. And where establishment is interpreted more broadly than mere preference between sects, one immediate area of the expanded coverage would seem to be state specification of religious view as a condition for participation in government.

Other examples of deliberate state promotion of religion can be suggested which undoubtedly should be included within the reach of an establishment concept that goes beyond the historic sense of that term. The earlier colonial legislation pertaining to the Sabbath, examples of which were cited in the *McGowan* case, specifically states that its purpose is to preserve the holiness and religious character of the Sunday. Little controversy would be stirred by the finding of establishment in the legislative purpose described by the instructive words "And to the end the Sabbath may be celebrated in a religious manner. .." If that is the primary object of the exercise of state power, its tolerance for diversity of Christian sentiment should not protect it from being held unconstitutional. To jar complacency of Christians, Justice Douglas multiplies examples of the same type of involvement as it might appear in non-Christian lands: state compulsion of fast during Ramadan; preservation of the sacredness of Friday or Saturday by requiring cessation of all commercial activity; prohibition of sales of pork because of religious scruples. These examples ignore the additional facts which could create the different question actually raised by McGowan, where both secular and sacred purposes were mingled. But they serve to illustrate what would clearly be promotions of religion if unimpaired by any purpose other than the sacred.

The difficulty comes, however, not in choosing instances of state action which easily qualify as aid or promotion of religion, but in stating a principle which will apply meaningfully to the variety of situations where involvement with religion may occur. It was toward the formulation of such a principle that Justice Frankfurter devoted part of his opinion in the Sunday closing cases. Starting with the assumption that the establishment clause covers more than the traditional established church, Justice Frankfurter approaches his task with the enunciation of an absolute disqualification of the state from any concern or competence with "a specific, but comprehensive,

190. See note 161, *supra*.
191. *Ibid*. 
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." The lingering temper of separationist thought must explain the extravagance of such a statement, for apparently it does not mean to prohibit a legislature from a concern for religious belief to the extent of granting an exemption from certain statutory requirements specifically based on those grounds. And man's "expression in action" of a religious belief does not disqualify the legislature from a competence to prohibit it, if that belief happens to be polygamy. The interesting point about such a statement is not what it says, but that the attitude it reflects about how the job of explanation should be begun. A rhetoric bar between religion and government is drawn against which the specification of principle is to be made.

The reduction of this broadside to the dimensions of a legal principle is achieved by specifying that the concern about religion which is prohibited to the state is the affirmation or promotion of religious doctrine:

If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine — primary in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion — the regulation is beyond the power of the state.

This refinement still leaves the problem of distinguishing between what is and what is not "affirmation or promotion of religious doctrine." By a quick reference, Justice Frankfurter indicates that he considers his standard exemplified by the McCollum case, a comment that evokes again the consideration of how precisely religion was promoted or affirmed in the released time situation. It is only argu-

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193. Justice Frankfurter refers to those states which do provide exemptions for Sabbatarians, Id. at 514-15, and comments "However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it." Id. at 520.


195. Justice Frankfurter deflates the sentence quoted in the text by this additional explanation: "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 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) (concurring opinion).

196. Id. at 466.
mentative to suggest that the *McCollum* program might be more accurately designated recognition of religious doctrine rather than affirmation or promotion? Suspicions that the matter is not beyond debate are encouraged by the variety of explanations which have been noted for the decision: the element of coercion; the financial aid rendered in the use of classroom and minor administrative services; the unique character of the public school setting. This diversity may manifest the singular validity of the conclusion, but it may as well raise doubts about the conclusion reached by the Court.197

The idea which plainly lies behind the Frankfurter test is sometimes expressed in the summary form that the state may not further religion ends as such. This statement presumably also includes the further qualification which is made explicit in the Justice's opinion in *McGowan*, that where the ends of a statute are both secular and religious, that law cannot stand if the secular ends could be attained by other means which do not have consequence for the promotion of religion.198

If one starts with the understanding that promotion of religious doctrine under this test is exemplified by the *McCollum* arrangement, the consistency of application of the standard creates difficulties. What secular ends are served by the ordinary community services provided to churches? Yet Justice Frankfurter makes it clear that when individuals use their religious freedom to build these churches, the state "may guard its people's safety by extending fire and police protection to the churches so built."199 The protection of life and property which ensues from state action in this regard might seem to be ends which are "derivative from, not wholly independent of, the advancement of religion." Both the person and the property are devoted, at the precise time the state is asked to take an interest, to religious worship and doctrine.

If, however, it is maintained that the presence of the individual, and the involvement because now the state is only reflecting its

197. Justice Brennan essays what may be still another explanation of the establishment of *McCollum* when, in distinguishing it from *Zorach*, he writes "... the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects while the *Zorach* program did not. ... To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction." School Dist. v. Schempp, 374 U.S. 203, 262-63 (1963) (concurring opinion).


awareness of the fact that citizens do go to church and practice religion, then how explain *McCollum*? The Religion Council which sought instructional time in the public schools was merely a reflection of the interests of a number of individual citizens. The state was being asked to recognize that fact and made provision for it.

In both cases, moreover, the proposition might be advanced that secular ends are being served. Both fire protection for churches, and released time programs on school premises, achieve the secular end of accommodating various denominations and their members who wish to perform acts, i.e., build a church or teach a religion class. This accommodation may be aimed at groups which are religious in nature, but its end is the effectuation of the secular interest of maximizing religious freedom. However paradoxical it may sound, religious freedom is a secular concern. Indeed, the very principles which the Court has so vigorously expounded underline the truth that it is only as a secular matter that the state can be concerned for this freedom, that is, the state cannot purport to defend religious freedom under a theory that religion is to be preferred to every other available ideological outlook on life.

The point urged here is that there are numerous instances in which the state takes cognizance of religion doctrine where the only secular end to be served by the regulation involved is the value of religious freedom itself. The Pennsylvania statute challenged in *Two Guys v. McGinley* made an exception to the prohibition on exhibition of motion pictures prior to 2 p.m. on Sunday for religious pictures shown by churches, provided they were shown on church property and without admission charge.\textsuperscript{200} The exemption of conscientious objectors from active military service represents a state purpose derivative from the religious position of the applicant for the exemption. The *Sherbert* case not only permits such affirmation of religion, but compels it as a constitutional mandate. If these are said not to represent affirmances or promotions of religious doctrine, how do they differ from *McCollum*?

There crystallizes out of a study of the Frankfurter approach a basic difficulty about identifying the conditions under which state treatment of religion affirms it, or aids, prefers, advances or assists it. These verbs carry an enormous weight in the proposed formulation, a weight which may squeeze significant meaning out of the terms. Perhaps in response to the uncertainty of what these verbs mean, Justice Brennan in *Schempp* follows the common statement of constitutional protection against discrimination or preference of religious

\textsuperscript{200} 366 U.S. 582, 586 (1961).
sect with a list of those types of involvements between religious and secular institutions which he believes are also enjoined. These are involvements which

(a) serve the essentially religious activities of religious institutions
(b) employ the organs of government for essentially religious purposes; or
(c) use essentially religious means to serve governmental ends where secular means would suffice.\(^{201}\)

The last category is the one under which he concludes the Bible-reading programs are invalid.\(^{202}\) Presumably it would also cover the Torcaso oath, used to assure faithful and honest public service. All three of the listings are generally within the scope of the Frankfurter test in that they represent state actions which either serve, employ the organs of government for, or use, "essentially religious activities or means."

Despite the greater specificity of this statement, questions may be asked about its reliability. Justice Brennan is as sensitive as any of his colleagues to the tenuous character of some of the judgments necessary in this field. On the one hand he recognizes the need to guard against those dangers which inspired the Framers to include the establishment clause, but he is equally aware that "religious differences among Americans have important and pervasive implications for our society.\(^{203}\) One indication that his effort to summarize the distilled essence of these two factors is imperfect is seen in the list of instances he gives where church-state accommodations would be permissible.\(^{204}\) In stating the rationale for some of these accommodations, Justice Brennan does not face the challenge of explaining how they fit his scheme of First Amendment involvements. It is difficult to see why service chaplaincies do not "serve the essentially


\(^{202}\) That category would be applicable on the assumption (for purposes of argument) that the devotional exercises serve some legitimate nonreligious purpose. Id. at 293-94.

\(^{203}\) Id. at 295.

\(^{204}\) In the concluding parts of his opinion, Justice Brennan reviews and finds unobjectionable such state involvements as the provisions of churches and chaplaincies at military establishments and penal institutions, draft exemptions for ministers, excusal of children from school for religious holidays, temporary use of public buildings by churches in disaster or emergency, invocational prayers in legislative chambers, non-devotional use of the Bible in public schools, tax exemptions for churches and religious institutions, public welfare grants on a nondiscriminatory basis for individuals "who become eligible wholly or partially for religious reasons." Id. at 296-304, 302.
religious activities of religious institutions," or why legislative prayer is not employment of "the organs of government for essentially religious purpose." His examples, which are commonly accepted as constitutional instances of accommodation, at least create doubts about the viability of the announced standards. A point comes in the multiplication of exceptions to a rule when the question must be asked what purpose the rule itself serves. The willingness to tolerate the exceptions rather than recast the rule is perhaps itself indicative of the felt complexity of the task, and the operation of subconscious preferences to which even judges are subject.

Both Justices Frankfurter and Brennan have set their sights on a defining expression of those church-state links which are proscribed by the establishment clause. It is doubtful that their marksmanship has been notably successful. They both start with an unwillingness to admit that government may contemplate directly and purposefully the manifestations of religious belief, individually or by group, in the society. Their analysis seems to contain the implicit hope that conventional involvements between church and state can be explained as no more than indirect contacts. As the nature of the deviations from their standards begin to appear, each admits that the line he is holding is not completely defensible or mathematically precise.

RELIGIOUS FREEDOM AS A GUIDE

Despite the doctrinal confusion stemming out of shifting attempts to define the limits of the establishment clause, certain propositions concerning the First Amendment have remained relatively constant as orienting principles for the Court. The first of these is that the ultimate purpose of the religion clauses is the protection of religious freedom. While opinions might differ in the concrete as to what this freedom entails and how it is to be achieved, the Court has never been prepared to maintain formally, what it has sometimes been accused of implying in its interpretations, that the Amendment is either ecclesiology and religious philosophy, or calculated disfран-

205. The most recent expression of that view is by Justice Goldberg in Schempp: "The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." 374 U.S. at 305. In Everson, Justice Black referred to the Amendment's purpose as "protection against governmental intrusion on religious liberty...." 330 U.S. 1, 13 (1947). Justice Frankfurter described the fight for disestablishment as "the struggle to free all men, whatever their theological views, from state-compelled obligation to acknowledge and support state-favored faiths...." McGowan v. Maryland, 366 U.S. 420, 460 (1961) (concurring opinion).
chisement of all religious influence on the state. Religious freedom grants the individual the right to "establish" his own church and to accept as binding its decisions on matters of morals, even though from one perspective he thereby subordinates his individual decisions to that of a church. At the same time, religious ideas and opinions may be carried by individuals into the public domain for whatever persuasive or enlightening value they have in regard to matters of governmental interest.

The limitations which the First Amendment imposes are thus limitations on government, and not on the individual. These restrictions are designed to allow everyone the maximum freedom in regard to religious conviction and action without any interference by the state on these matters. In one sense, it is true to say that the Amendment protects government from religion, but this must be understood in a special sense. It is not that religious bodies in a state radiate evil or subversive tendencies, or that any contact with them is detrimental to the state. That would imply that the Framers were skeptical about the worth of religion, where it is quite clear that their keen appreciation of its value, along with the eminently pragmatic political wisdom which sought to keep religious dissention out of the federal area, led to the adoption of the Amendment. The specific danger to government which the Amendment is concerned with is the possibility that organized religion will use the state for its own purposes to the detriment of religious liberty. For what the divinely-sanctioned or cleric-ridden government will tend to do is prescribe what religious truth is. That is ultimately what separation was meant to avoid. So separation serves religious liberty by rendering government neutral and incompetent on matters of religious dogma and practice.

The particular manner, then, in which the Amendment protects religious liberty is a negative one. The Framers were not affirmatively setting forth what religious liberty consists in or how the individual should employ his freedom. Rather they were isolating the state from interference with this freedom by forbidding laws respecting an establishment and laws prohibiting the free exercise of religion. A start toward an integral reading of the clauses may be made by asking in what respects the two portions of the Amendment service this overriding purpose of religious liberty by their leashing of government.

The free exercise clause projects a relatively clear picture in terms of service done to religious liberty, for the prohibition of governmental interference in this area relates to complaints by an individual or

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legal entity alleging a measurable impediment to worship or religious practice as a result of state action. Whatever the state's purpose or object in pursuing a particular course, be it secular or religious in character, the constitutional test is whether such action infringes the exercise of religion.

Turning to the establishment clause, one is immediately aware that the service it performs for religious freedom is not so apparent or simple of statement. Yet there is still much that is clear. Surely no one would doubt that governmental efforts to choose one set of religious beliefs and give them official endorsement as theologically preferable to all others would be a direct attack on religious freedom. Whether sanctions were put behind these chosen beliefs or not, the characterization of one view of ultimate reality as more "American" or acceptable than another would involve the state in judgments for which it has no competence. Similarly, since religious freedom in the political sense must include the right not to believe, the government could not formally align itself with Christianity, or Deism, or religiosity generally because, again, the evaluation of various spiritual outlooks is not within the objectives of government. These kinds of state involvements should be considered establishments for a practical reason, too, for governmental action to settle religious truth is almost always accompanied by pressures or persuasions on behalf of a religion, or all religions. Normally, in other words, these official endorsements of theological views would produce an effect on someone's free exercise of religion. When Maryland used a religious means to assure the honesty of its public officials through the test oath, pressure was invariably brought to bear on individuals who did not believe in God. Since these governmental backings of religious truth can ordinarily have significance only if they are tied in with some public benefit or privilege, they simultaneously create free exercise issues. But even without such an effect, an analysis of the relevant historical background and an assessment of our traditions pertaining to the role of government would support a prohibition against state creation or evaluation of sacred things. Even though no child in the New York classroom had its free exercise of religion infringed, the fact that state agents composed the prayer in the Engel case constituted establishment.

In addition to those situations where the state endorses or expresses theological views, establishment would seem to be the conclusion whenever the state singles out a religion, or religions generally, for direct financial assistance. Rather than purporting to determine theo-

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logical truth directly as in the endorsement of beliefs, the government through taxation would be aiding and preferring a particular exponent of religious truth. This type of assistance Justice Reed defined 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." Both the enormous state power over religion which such dependence would serve to encourage, and the strong historical identification of such programs with establishment, would point to the conclusion that such aid threatened religious liberty.

While economic aid directly to religion may be a readily identified form of prohibited association, the principle under which it may be banned is actually broader than mere financing. Any time preference for one church, or all religions as against irreligion, is the object of state action, establishment would seem to be the conclusion. But the question of consuming importance in this regard is what exactly is meant by preference or aid if no direct subsidies are involved. When no coercion is directed against an individual in his religious exercise and when the governmental purpose is not the expression of religious truth, what are the signs of establishment? A review of the judicial thinking from Everson to the present shows a gradual awareness that the standard cannot be mere recognition or cognizance of religion by the state. As Justice Brennan said in Schempp, "Nothing in the Constitution compels the organ of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society." Thus it will not do to speak as if the mere fact that religion becomes an object of state concern is enough to condemn the action as establishment.

Having disposed of obvious cases, the testing question becomes: what other forms of state involvement with religion pose real hazards for religious freedom? If it is recognized that coercion will not always be present to identify the objectionable relationships, and further understood that the civic and spiritual dimensions of human life are not antipodal, the enormous difficulty of that question begins to appear. The reticulated complexity of the question—dealing as it does with the countless ways in which church and state make contact—may make some wonder whether the Supreme Court is the proper agency to supply an answer. The assumption that all issues are best

resolved as legal ones has been challenged,\textsuperscript{211} and the wisdom of a bevy of Platonic Guardians has been doubted.\textsuperscript{212} Nevertheless, the Court is for good or bad engrossed in the attempt to provide a rational foundation for judging all such involvements between church and state. What factors are to be assessed in such an undertaking, assuming the object is the preservation of religious freedom?

One source of help which has steadily become more important to the Court is the bearing which the free exercise clause has on the interpretation of establishment. As Justice Brennan has expressed it, "There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment."\textsuperscript{213} The implications of this sentence regarding the soundness of past doctrine are striking. In effect the statement admits that the Court's opinions have created a tension between the establishment clause and religious liberties. In fact, it is a common slip of the pen to contrast the establishment prohibition with religious freedom as protected by the free exercise clause. Yet it seems indefensible to argue that there is some undefined relationship called establishment, restrictive of both state power and the political activities of religious individuals, which cannot be permitted even though its consequences for religious liberty are nil. Whatever is condemned as establishment must be condemned on the basis that it imperils religious freedom or affects it adversely. The problem is trying to define what are the marks of such perils. Justice Brennan is pointing out that the Court, while it need not limit the scope of establishment to the sole measure of imminent restrictions of an individual's freedom, should at least recognize that where the very conclusion of establishment impedes the religious freedom of others, caution is called for in reaching that result.

But what does Justice Brennan mean by religious freedom in this context? It is significant that he does not restrict himself to only those cases where the establishment conclusion simultaneously represents a denial of someone's free exercise. That is, it is not necessary to first determine under existing doctrine whether an individual would have a valid free exercise claim if the state involvement being challenged were declared an establishment. The very example which Jus-

\textsuperscript{211} See note 189, \textit{supra}.
\textsuperscript{212} \textit{Hand, the Bill of Rights} 73 (1958). "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."
tice Brennan employs to make his point, state provision of chaplains for members of the armed forces, may not be a constitutional requirement of the free exercise clause. At least he does not deem it essential to establish that point, since he concludes "I do not say that governments must provide chaplains . . ." 214 Hence the religious freedom which the Court ought to consider as part of its determination whether a particular involvement is an establishment includes the freedom of the person benefiting from the governmental program. And this element is relevant even though a free exercise claim is untenable against the threatened conclusion of the establishment bar.

This conception of religious freedom in the board sense as limiting the meaning of establishment has much to recommend it. A distortion of the meaning of religious freedom occurs when it is translated as nothing more than free exercise of religion in the legal sense. The latter represents the extremities of state power as it may bear on an individual and his religious beliefs; it does not describe or reflect the extremity of religious freedom as it may be enjoyed by the individual acting as citizen. The free exercise standard is a guide to what the state cannot do under the Constitution, but it does not tell us what the individual can do by way of exercising his religious freedom in the civic environment. Hence there is every reason, in deciding under what circumstances a governmental involvement with religion is prohibited, to look at the practical effect which a decision will have on the opportunity of persons in the society to enjoy their full religious freedom. 215

The conflict of which Justice Brennan spoke, then, is not only between the two parts of the First Amendment. Obviously when the legal standards for free exercise are violated by prohibiting certain governmental actions labelled establishment, the Amendment is being read to put its parts at cross-purposes with each other. In that situation, the certainty of the burden which will fall on the individual would seem to dictate that the idea of establishment be re-examined. But the relevance of religious freedom for First Amendment interpretation is not restricted to that kind of situation. Not merely what an individual can claim as a constitutional right, but the full political freedom which he has to exercise his religious beliefs, as well, should play a part in the meaning given to establishment.

This kind of consideration is not new to the Court. Justice Black in *Everson* saw quite clearly that genuine interests of religious freedom were represented by those parents in New Jersey who wanted to share

214. *Id.* at 299. Italics in original.

in the school bus program and still send their children to Catholic schools, even though no free exercise claim was before the Court. Similarly, the Court has apparently taken into account the legitimacy of a legislature's concern for religious freedom of Sabbatarians, since it has refused to hold that an exemption from Sunday closing laws constitutes establishment.\(^{216}\) And it will be recalled that the Court has specifically ruled that the constitutional free exercise of religion is not infringed by the refusal to provide such an exemption.\(^{217}\) Despite the number of instances in which the Court has displayed an appreciation of the consequences for freedom of a holding against governmental involvement with religion, an unarticulated premise continues to assert itself that all involvements are per se bad. The pervasive attitude of many judicial opinions is that only the most pressing circumstances of privation to religion will justify an accommodation of religion by the state.

A good example of this attitude may have been provided by Justice Brennan in his analysis of the respective interests served by the First Amendment as applied to public schools. In his view, free exercise permits the parent to choose to send his child to a private school for religious training, and the establishment clause protects against any attempts to introduce religion into the public school.\(^{218}\) Justice Stewart challenges the validity of this approach when he asks, in effect, why the exercise of religious freedom should be denied individuals within the framework of a public institution. In other words, why cannot each of the participants in the Bible-reading programs expect the Court to give serious attention to their claims of freedom to say a prayer? The claim is not that the denial of the opportunity to read the Bible in school is a violation of free exercise; rather the position simply argues that any citizen is entitled to maximum freedom of religion consistent with everyone else's freedom, and therefore the right to effectuate such programs as that involved in Schempp and Murray ought not to be constitutionally barred.\(^{219}\) When Justice Brennan concludes that the public schools cannot be the occasion for such a manifestation of religion, he may rely upon the establishment clause under any one of the shadowy rationales which the Court has developed. Or perhaps his conclusion is instinctive, and judgment outstrips analysis. But it ought to be recognized that in spinning out

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\(^{218}\) See text at note 178, supra.

\(^{219}\) For an analysis and rejection of the argument that the exclusion of prayers from public schools represents a violation of the free exercise clause, see Pollack, supra note 177. See infra note 220.
elaborate theories based on historical analogues and tendentious fears, the Court is also disposing of an important interest of present users of these public institutions.

One may contend that the establishment clause is basic, and anything which parades under the concept of religious freedom must first show that it does not disturb the exegesis of the first 10 words of the Amendment. But surely the establishment clause is not so self-defining or readily reducible to unchallengable meaning that the Court can ignore or treat cursorily the evidence of present denial of religious freedom. This is not to contend that these claims should necessarily prevail, but only to express doubt that the standards for detecting unconstitutional involvements are so obvious that no judicial balancing of individual claims to religious freedom is needed.

Once it is recognized that judicial determinations of establishment have significance for the opportunities of individuals to take advantage of their religious freedom, as well as in the provision of bulwarks against religious authoritarianism by the state, the role being discharged by the Justices can be better appreciated. For if the Court prohibits involvements of state and religion on the ground that indirect preferences are de facto involved, such as the variation in sects' willingness and ability to participate in a released time program, at one and the same time a public facility is removed from use by one group of individuals and made more acceptable to the religious groups who cannot or will not use that facility. The point is not that the schools therefore become institutions which by their structure violate the free exercise of religion of those who want to have these instruction classes on premises. Neither is the proposition maintained that the official exclusion of such practices itself creates an established religion. But the urgency of explaining why such a result is constitutionally demanded is increased by the understanding that the decision amounts to a judicial preference for the religious freedom of those who want the instructions excluded from the premises, as against those who think it desirable to offer such classes. In serving one man's freedom the Court is disserving another's.220

220. The conclusion that the prohibition of prayers from public schools does not violate the First Amendment leaves untouched the question whether as a matter of religious freedom in the broad sense, the secularization of these schools by constitutional interpretation does not de facto favor groups with particular views about religious training. In that sense the allegation that a religion of secularism is being "established" cannot be lightly dismissed. Similarly, if one argues that the intrusion of voluntary religious programs in the schools produces indirect coercive effect upon those students who do not wish to participate, the exclusive of these programs by judicial decision has a similar effect on those children who do wish to participate (i.e., through state action they are directed (coerced?) to abandon such practices in the schools). See note 156 supra.
A sharper awareness by the Court that religious freedom is sometimes represented by those favoring state involvements as well as those opposing them would lead to a more liberal approach to church-state problems. This does not imply that every claim of religious freedom must be, or could be, recognized. The conceptual framework for decision might be loosened, however, to permit a more comprehensive evaluation of all the factors present in a given case. Rather than starting with an assumption that a construct called establishment is objectively discoverable and represents an inflexible base-point for judicial reasoning, the assumption would instead read that the primary thrust of the First Amendment is to provide the maximum opportunity for religious manifestation. This approach would ask at what point the expression of religious freedom by those who take advantage of secular facilities or agencies exceeds what the rest of society can safely endure, for fear of their own religious freedom. Establishment would thus become the limit of religious freedom permissible in the state, as free exercise is now the limit of state interference with a particular individual’s freedom.

This will sound like unmitigated heresy for those who have adopted the separationist prejudice. But such an approach does not require any radical departure from the pattern of conclusions which has emerged in church-state decisions. The Everson dicta would still apply across the board. Certainly the state could not set up a church or contribute money directly to a church for its support. There never has been any dispute that the Amendment prohibits the historic type of establishments. Furthermore, the standard of aid or preference to religion generally, as opposed to favoritism of a particular sect, would still constitute establishment. The specific danger in such preferences is the power which the state would hold to shape and affect, directly or indirectly, the free religious choices of its citizens.

But the sensitivity to all aspects of religious freedom which this approach calls for might well have an effect upon what would be considered aid or preference. The deliberate accommodation by the state of all religious views in a particular secular program would not in itself be considered aid.

A comparison of the McCollum, Engel and Schempp cases may serve to illustrate the significance which such an approach would have. In all three of these involvements, a public institution was the scene of a particular type of exercise of religious freedom. One element of the determination of whether these programs are establishments is the claim made by their sponsors that a given number of citizens desire that their children have a chance to participate. The cost of the use of the public property is infinitesimal, and the officials in charge of
the buildings have discretion to determine whether employment of the facility by outsiders should be conditioned on payment for wear and tear.\footnote{221}

One great difference in the three arrangements is that teachers participate in and administer the religious manifestation in the prayer cases. Furthermore, the state officials are engaged in the writing of the prayer or the selection of the books to be read (i.e., the Bible). While both Engel and Schempp relate to worship, and McCollum to religious instruction, the critical difference between them is that for the released time program the state need only provide the opportunity for religious pluralism to manifest itself, while in the prayer cases the state agencies themselves present the religious element. As noted earlier, there is solid ground upon which to argue that the state should not compose a prayer or choose a religious selection, thus implying governmental approval of their spiritual validity. But that is quite different from permitting private individuals and organizations to say prayers or receive religious instructions on public property.

In Engel and Schempp, the state was not merely reflecting religious diversity; it was writing prayers and specifying religious reading. But suppose that the rule of the Board of Education merely granted groups of students the right to meet at certain times by themselves or under parental supervision to say a prayer, or read the Bible. Why should the state decision to permit or deny such a program be a matter of constitutional decision? Of all the establishment decisions, probably only the McCollum result would be changed by an application of the principle of religious freedom as a guide to the meaning of establishment.

\footnote{221. As Justice Brennan has remarked, this kind of "actual incremental cost" are "negligible." School Dist. v. Schempp, 374 U.S. 203, 262 (1963) (concurring opinion). Compare the views expressed in note 170, supra.}