Recent Decision: Religious Oaths

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does not, for instance, require the state to appear completely indifferent before religion. Mr. Justice Douglas said in his majority opinion in *Zorach* that the first amendment commands:

> separation must be complete and unequivocal... no exception... absolute. The First Amendment, however, does not say that in every and all respects there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly... We are a religious people whose institutions presuppose a Supreme Being.\(^{70}\)

That is, only in the areas of establishment and freedom of religious pursuit must the separation be universal; in other areas the doctrine of sensible accommodation would allow a realistic degree of contact without being in violation of the principle of separation. The Court of Appeals has held that the Regents Prayer is within the bounds of permissive accommodation. In support of New York’s position the Supreme Court may look to “literally countless illustrations... that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of government and society.”\(^{71}\) In addition, the Court may then turn its attention to a judicial philosophy ratifying noncompulsory nonsectarian prayers and Bible readings in the public schools, which antedates the fourteenth amendment\(^ {72}\) and which has continued to the present day a reflection of predominant sentiments.


\(^{72}\) Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256 (1854). For a comprehensive survey of the

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In *Torcaso v. Watkins*,\(^2\) a recent case before the United States Supreme Court, petitioner was appointed a notary public by the Governor of Maryland but the commission was never issued because petitioner refused to make the following declaration: “I, Roy R. Torcaso, do declare that I believe in the existence of God.”\(^3\) This declaration was demanded of the petitioner in order to fulfill the requirement contained in Article 37 of the Maryland Declaration of Rights that state officers declare their belief in God.\(^{71}\) The United States Supreme Court, reversing the Court of Appeals of Maryland, *held* that this “test” for office unconstitutionally invaded “the appellant’s freedom of belief and religion” and that he was entitled to a writ of mandamus compelling the issuance of his commission.

The instant case is the latest chapter in the history of the test oath, an institution which appeared on the American scene before the United States was established. Religious tests and oaths were part of the machinery of the established churches evolution in social, statutory and judicial attitudes regarding the relationship between church and public schools, see *Johnson & Yost, Separation of Church and State* (2d ed. 1948).


3 Article 37 declares “that no religious test *ought* ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.” (Emphasis added.) The Maryland Court of Appeals, in *Torcaso v. Watkins*, *supra* note 2, at —, 162 A.2d at 441-42, decided that the word *ought* was not used in a permissive sense with regard to belief in God, but that a declaration of such belief was mandatory and required no legislative enactment to make it so.
found in several of the American colonies prior to the revolution.\textsuperscript{4} However, when the colonies formed the United States they provided in article VI of the federal constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."\textsuperscript{5} Shortly thereafter, in order to better protect the religious freedom of the people, the first amendment to the Constitution was ratified, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

In \textit{Reynolds v. United States},\textsuperscript{6} a prosecution for bigamy, the Supreme Court held that the first amendment prohibited Congress from regulating religious beliefs, but did not interfere with the regulation of overt acts harmful to the state, even if the act was done in the name of religion.

Both article VI and the first amendment protected religious freedom from impairment by the federal government, but neither of them provided such a guarantee with respect to state action. This situation was remedied by the passage of the fourteenth amendment, the first section of which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In \textit{Gitlow v. New York},\textsuperscript{7} the Supreme Court assumed that the freedoms of speech and press protected by the first amendment are "among the fundamental personal rights and 'liberties' protected by the due process clause of the fourteenth amendment from impairment by the States."\textsuperscript{8} Applying this principle in \textit{Schneider v. State},\textsuperscript{9} some fourteen years later, the Court found that a law against soliciting on the public streets violated these liberties.

In \textit{Cantwell v. Connecticut},\textsuperscript{10} the Court specifically included freedom of religion as one of the first amendment liberties protected from state interference by the fourteenth amendment.\textsuperscript{11} The Court held unconstitutional a statute requiring that persons soliciting alms for religious causes obtain a certificate of permission from a state officer, who would determine whether the cause was in fact a religious one. The reasoning of the Court was that such a requirement imposed a prior restraint upon the exercise of religion, since it allowed a public officer to determine whether a body was religious \textit{before} that body could function freely.\textsuperscript{12}

\textit{Everson v. Board of Educ.},\textsuperscript{13} while holding that the use of public funds to provide transportation for students of parochial schools was not a violation of due process or an establishment of religion, emphasized that neither the state nor federal government can "force [a person] . . . to profess a belief or disbelief in any religion."\textsuperscript{14} However, \textit{McCollum v. Board of Educ.},\textsuperscript{15} held unconstitutional the use of public school

\textsuperscript{5} See 4 ELLIOT, \textit{DEBATES} 191-200 (2d ed. 1937).
\textsuperscript{6} 98 U.S. 145 (1878).
\textsuperscript{7} 268 U.S. 652 (1925).
\textsuperscript{8} Id. at 666.
\textsuperscript{9} 308 U.S. 147,160 (1939).
\textsuperscript{10} 310 U.S. 296 (1940).
\textsuperscript{11} Id. at 303.
\textsuperscript{12} Id. at 304.
\textsuperscript{13} 330 U.S. 1 (1947).
\textsuperscript{14} Id. at 15.
\textsuperscript{15} 333 U.S. 203 (1948).
facilities for religious instruction, on the
ground that such use violated the principles
of freedom of religion and separation of
church and state established in the earlier
cases cited above. Finally, *McGowan v.
Maryland,* dealing with the validity of
Sunday Closing Laws, stressed the invalid-
ity of such laws if enacted for the purpose
of aiding one or even all religions. The
laws in question were upheld on the ground
that they were a legitimate exercise of the
police power for the general good.
The Court, in the instant case, rendered
its decision in the light of the tradition
established in the above-mentioned cases.
This tradition maintains that the state may
do nothing which aids one or several re-
ligions, or which impairs the rights of any.
Nor may the state do anything which tends
to lessen the religious liberty of any indi-
vidual, subject to the exception that the
state may prohibit *action* obnoxious to
the common welfare, although the practice
in question be done in the name of religion.

17 *Id.* at 453.
18 *Id.* at 444-45.
19 The rule with respect to pure belief not evi-
denced by overt action is that "one be permitted
to believe what he will." American Communica-
See *Dennis v. United States,* 341 U.S. 494, 507-
08 (1951). One early case in the area of religious
belief, *Davis v. Beason,* 133 U.S. 333 (1890), up-
held as valid a requirement that those registering
to vote take the following oath: "[A]nd I do
further swear that I am not a bigamist or polyga-
mist; that I am not a member of any order,
organization or association which teaches, ad-
vises, counsels, or encourages its members, dev-
otees, or any other person to commit the crime
of bigamy or polygamy...; that I do not, and
will not, publicly or privately, or in any manner
whatever, teach, advise, counsel, or encourage
any person to commit the crime of bigamy or
polygamy..." *Id.* at 336. This oath appears to
be an attempt to regulate adherence to a belief,
whether or not that belief is acted upon. To
the extent that the *Beason* case upholds this at-
tempt, it no longer seems to be a controlling au-
thority in light of the *Douds* case.
21 *Id.* at 491.
22 *Torcaso v. Watkins,* 223 Md. 49, --, 162 A.2d
438, 443-44 (1960). MD. ANN. CODE art. 68, § 3
(1957) provides that notaries shall have the
power to administer oaths. Article I, § 10 pre-
scribes the form of an oath: "In the presence
of Almighty God I do solemnly promise or de-
clare..."
The conclusion of the Court in the instant case with respect to the unconstitutionality of religious test oaths is not startling, especially in view of the clear prohibition contained in article VI of the Constitution and the history and tradition of the United States. However, the significance of this case lies not in its conclusion, but rather in certain statements made by the Court with respect to past decisions in the area of freedom of religion. There had been some speculation that the decision of the Supreme Court in Zorach v. Clauson was a retreat from the position taken in Everson and McCollum. In the present case the Court emphatically denied that it had made such a retreat. It stated:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a "person to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

This seems to be a definitive statement of the law, since there was no dissenting opinion. Two justices, however, merely concurred in the result.

Torcaso v. Watkins synthesizes the American law of religious freedom: the state shall not aid or inhibit any religion or the practice thereof. The first amendment considers this freedom from the dual aspect of establishment of religion and impairment of rights. In practice the two are often intermingled, as the test oath in the present case indicates. This declaration both "establishes" theism and impairs the rights of the atheist. In the process of deciding cases concerned with both aspects of the problem the Supreme Court has evolved one law: to prevent establishment and protect free exercise there shall be complete separation of church and state. This case is an emphatic reiteration of that doctrine.

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24 343 U.S. 306 (1952). In that case the Court held that the Constitution did not prohibit a program by which public school students were dismissed early in order to attend religious instructions. There were three dissenting opinions.


26 Torcaso v. Watkins, supra note 20, at 494-95.

27 Id. at 495.